United States Court of Appeals

for the Second Circuit

APPENDIX

74—1277

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE FELDMAN, as Trustee in Bankruptcy of Leasing Consultants Incorporated, Bankrupt,

Plaintiff-Appellee,

against

CHASE MANHATTAN BANK, N.A.,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of New York

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APPENDIX

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff-Appellee
350 Fifth Avenue
New York, N. Y. 10001
736-1000

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

DATE	
3-22-73	Filed complaint and issued summons.
4-16-73	Answer and counterclaim of defendant.
4-17-73	Plaintiff's reply to defendant's counterclaim.
4-25-73	Plaintiff's motion for summary judgment.
5-30-73	Stipulation and order adjourning hearing on plaintiff's motion for summary judgment before Judge Bauman to June 18, 1973.
6-5-73	Stipulation and order substituting Milbank, Tweed, Hadley & McCloy for Matthew Donohue as attorneys for defendant.
6-15-73	Defendant's notice of motion for summary judgment before Judge Bauman on June 18, 1973.
1-9-74	Plaintiff's reply statement in opposition to defendant's cross-motion for summary judgment.
1-9-74	Affidavit of Daniel A. Zimmerman in support of plaintiff's motion for summary judgment.
1-9-74	Filed opinion #40,192.
1-25-74	Filed judgment #74,116 entered January 28, 1974 granting plaintiff's motion for summary judgment, and ordering that plaintiff recover $53,460 with interest from defendant.
2-25-74	Defendant's notice of appeal.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

GEORGE FELDMAN, as Trustee in Bankruptcy of Leasing Consultants Incorporated, Bankrupt,

Plaintiff,

against

CHASE MANHATTAN BANK, N.A.,

Defendant.

73 Civ. 1205

(Bauman, J.)

Complaint

1. Plaintiff is the duly qualified and acting trustee in bankruptcy of Leasing Consultants Incorporated ("LCI"), a New York corporation which filed a petition for arrangement in the United States District Court for the Eastern District of New York pursuant to Chapter XI of the Bankruptcy Act on August 18, 1970 and was subsequently adjudicated a bankrupt by order dated October 16, 1970.

2. Defendant Chase Manhattan Bank, N.A. ("Chase") is a national banking association formed under the laws of the United States, with its principal offices in the City, County and State of New York.

3. The action arises under the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. as hereinafter more fully appears. The matter in controversy exceeds, exclusive of costs the sum of ten thousand dollars. Jurisdiction is further predicated upon 11 U.S.C. § 110 and 12 U.S.C. § 94.

4. On or about April 25, 1967 LCI as lessor and Zinke-Smith, Inc. (presently known as Devcon International Corporation) as lessee executed a "lease agreement" covering a Cessna 411 aircraft. A copy of said lease agreement is annexed hereto, marked exhibit "1" and made a part hereof.

5. On or about July 11, 1967 LCI assigned its rights under the aforesaid "lease agreement" to Chase as security for LCI's indebtedness to Chase. A copy of said assignment is annexed hereto, marked exhibit "2" and made a part hereof.

6. Neither lease nor assignment was filed for recordation with the Administrator of the Federal Aviation Administration.

7. Chase failed to perfect its security interest in said "lease agreement" and the payments made thereunder.

8. Upon information and belief Chase has received twenty-two (22) payments of $2,430.00 each subsequent to August 18, 1970.

9. Chase's interest in said payments is subordinate to the rights of plaintiff and invalid as against plaintiff.

WHEREFORE, plaintiff prays for judgment against defendant Chase Manhattan Bank, N.A. in the sum of $53,460 plus interest from the date each of the component payments was received, plus the costs of this action.

Dated: New York, New York
March 20, 1973

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff

By: s/ GEORGE A. HAHN
For the Firm

350 Fifth Avenue
New York, New York 10001
Tel. No.: (212) CH 4-6800

10023

LEASING CONSULTANTS INCORPORATED
95-20 63rd Road, Forest Hills, N.Y. 11374
212-275-1500

LEASE NO. 1010

LEASE

THIS LEASE made this 25 day of April 1967 by and between LEASING CONSULTANTS INCORPORATED, a New York corporation, hereinafter called the "Lessor" and Zinke-Smith, Inc. Race Track Road, Pompano Beach, Florida hereinafter called the "Lessee":

WITNESSETH:

In consideration of the mutual covenants and promises hereinafter contained, the parties hereto agree as follows:

1. Lessor hereby leases to Lessee and Lessee hereby hires and leases from Lessor the machinery, equipment and property (hereinafter refered to as the "Equipment") described in the schedule and or schedules hereafter executed by the parties hereto and made a part hereof, for the term as fixed in the schedule and/or schedules annexed hereto.

2. The Lessee agrees to pay rent to the Lessor for the use of the Equipment at the rate and in the manner set forth in the schedule and/or schedules annexed and to be annexed hereto, together with the additional rent provided for herein.

3. Lessor agrees to cause the Equipment to be delivered to the Lessee, and Lessee agrees to assume all risks of loss or damage to the Equipment occurring during the delivery of the Equipment to Lessee. Lessor assumes no liability for loss or damage occurring during delivery or arising from late delivery or non-fulfillment of the agreement by reason of fires, strikes delays in transportation, failure of any supplier with whom Lessor has contracted to furnish any or all of such Equipment to the Lessee, or any cause beyond the control of Lessor. Lessor shall not be liable for specific performance of this lease but delay of delivery of Equipment shall not affect the validity of this lease.

4. Lessee agrees that the Equipment shall be kept and used by the Lessee at the location specified on the schedule or, if not therein specified, at the address of the Lessee as hereinabove set forth. The Equipment shall be used solely in the conduct of Lessee's business and shall not be assigned or sublet or used by others than Lessee or its employees. The Equipment shall not be removed from the locations herein specified without the consent of Lessor granted in writing. Lessee shall immediately and firmly attach in a suitable location on the Equipment a metal plate furnished by Lessor and inscribed, "Property of Leasing Consultants, Inc.", or its assignee, as the case may be. The Lessee shall not mar, deface, multilate, remove or in any way interfere with the said metal plate and shall notify the Lessor if it should become lost or illegible.

5. In addition to the rent provided for in the schedule annexed hereto, Lessee shall pay as additional rent an amount equal to the actual transportation costs of such Equipment FOB plant designated by the supplier of said Equipment, which costs shall be added to and become part of the rental payable with the initial installment of rent, and any insurance charges paid by Lessor under the provisions of Paragraph 12 of this lease. Should Lessee fail to pay rent due hereunder within ten days after same shall accrue and become payable, then in such event Lessee shall pay to Lessor late charges equal to five cents (5¢) for each dollar of rental payment in arrears per month. Initial rental payment following delivery of Equipment shall be apportioned so as to make uniform the due dates of rental payment for all equipment and to make all later rental payments payable on the first day of each month thereafter.

6. Lessee shall at its own cost and expense:

(a) Provide and pay for electric power, servicing and maintenance for the Equipment including repairs, parts, supplies, labor and tools as may be required.

(b) Maintain the Equipment in good working order, repair and appearance and, when not in use, keep the Equipment in a protected area, and shall, in effecting maintenance and repairs, have such work performed only by qualified persons who are satisfactory to Lessor.

7. Lessee shall not without the prior written approval of Lessor affix or install any accessory, attachment or other device to the Equipment leased hereunder. All repairs, replacements, parts, supplies, accessories, attachments and devices furnished or affixed to the Equipment by Lessee shall thereupon, unless otherwise agreed in writing, become the property of the Lessor.

8. Lessee shall cause the Equipment to be operated only by competent operators and shall pay all expenses of operation.

9. Lessor shall not be required to make any repairs to the Equipment or to replace the Equipment or any of its parts, attachments or accessories. Lessor shall not be liable to Lessee for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment leased hereunder or by the use or maintenance thereof or repairs, servicing or adjustments thereto or by any delay or failure to provide the same or by any interruption or loss of use thereof or for any loss of business or damage whatsoever and howsoever caused.

10. Upon the expiration of the term or sooner termination of this lease, Lessee shall, at its own cost and expense, return the Equipment to the Lessor at Lessor's place of business, or at such place packed and ready for shipment as Lessor may specify.

11. Lessee assumes all risk and liability for, and agrees to save and hold Lessor harmless in respect to, each item of the Equipment leased hereunder and for the use, operation, storage and return delivery thereof to Lessor and damages for injuries and death to persons and property howsoever arising therefrom or because thereof, and Lessee shall save and hold Lessor harmless from any and all of the following, whether the same be actual or alleged: all claims and liens for storage, labor and materials and all loss of and damage to the Equipment and all loss, damage, claims, penalties, liability and expense including attorney's fees, howsoever arising or incurred because of the Equipment or the return delivery to Lessor, or the storage, maintenance, use or operation thereof, and other claims arising in connection with the manufacture, selection, purchase, delivery, possession, use and operation of same and from any claims arising under insurance policies covering said equipment.

12. Lessee at its own expense shall keep each item of the Equipment insured at the full insurable value thereof against fire and theft and under extended coverage or "all risk" type of insurance, with losses, if any, payable to Lessor or its assignees as their interest may appear. All insurance shall be in amounts and companies as shall be acceptable to Lessor. Lessee shall promptly, at the request of the Lessor, deliver to Lessor evidence of said insurance together with receipt for the premiums thereunder. If Lessee shall fail to provide the insurance protection required hereunder or fail to pay the premiums therefor, Lessor may insure the Equipment at Lessee's expense and any premium or premiums so paid by Lessor shall be repaid by Lessee with interest at the legal rate within thirty (30) days thereafter, and failure to do so shall be deemed to be a breach of this lease. Each policy shall expressly provide that such insurance as to Lessor and its assigns shall not be invalidated by any act, omission or neglect of Lessee. Lessor may apply proceeds of such insurance to replace or repair the equipment and or to satisfy Lessee's obligations hereunder, or may require that Lessee so replace the same with equipment of like nature and in good repair. No loss, theft, damage or destruction of the Equipment shall relieve Lessee of the obligation to pay rent or any other obligation under this lease. If Lessor determines that any item of Equipment is lost, stolen, destroyed or damaged beyond repair, Lessor may, in lieu of the foregoing, require that Lessee pay Lessor in cash all sums then owed by Lessee to Lessor under this lease, together with the unpaid balance of the total rent of said item or items of Equipment for the pending term of this lease and an amount equal to ten (10%) per cent of the actual cost of said

item, whereupon Lessor shall assign to Lessee without warranty expressed or implied its right, title and interest in such Equipment. The parties hereto agree that the said sums will equal the fair value of such item on the date of such loss, theft, damage or destruction.

13. Lessee shall comply with and conform to all laws and regulations relating to the ownership, possession, use or maintenance of the Equipment and save Lessor harmless and not actual or asserted violations, and pay all costs and expenses of every character occasioned by or arising out of such use, and pay promptly when due all taxes and other public charges against or upon the Equipment. Lessee shall pay all charges and taxes (local, State and Federal) which may now or hereafter be imposed upon the ownership, leasing, rental, sale, purchase, possession or use of the Equipment.

14. This is an agreement of lease only, and nothing herein shall be construed as conveying to Lessee any right, title or interest in or to the Equipment leased hereunder except as a lessee only. Title to the Equipment shall at all times remain in Lessor. Lessee shall at all times protect and defend, at its own cost and expense, the title of Lessor from and against all claims, liens and legal processes of creditors of Lessee and shall keep all of the Equipment free and clear of such claims, liens and processes.

15. This lease and all rights of Lessor hereunder shall be assignable by Lessor without the consent of Lessee and without prior notice to the Lessee but Lessee shall not be under any obligation to any assignee of Lessor except after written notice of such assignment from Lessor. Without the prior written consent of Lessor, Lessee shall not assign this lease or its interest thereunder or enter into any sublease with respect to the Equipment covered thereby. Any assignees of Lessor shall be entitled to all rights and remedies herein conferred on Lessor, but Lessor shall not thereby become such assignee's agent. Lessee will settle all claims against Lessor directly with Lessor. Lessor hereby agreeing to remain responsible therefor, and Lessee will not set up any claim or defense against any assignee of Lessor. Without limiting the generality of the foregoing, the Lessee agrees that the Lessor may assign all right, title and interest of Lessor in and to all monies due and to become due to Lessor hereunder to a financing institution (hereinafter called Assignee), consents to any such assignment and, in the event of such assignment, Lessee agrees with the Lessor as follows:

(a) That its obligation to pay directly to the Assignee the amounts (whether designated as rentals or otherwise) which become due from the Lessee hereunder shall be absolutely unconditional and those amounts (or, on failure to pay those amounts, monies equal to those amounts) shall be payable to the Assignee by the Lessee whether or not this lease is terminated by operation of law or otherwise, and the Lessee promises so to pay the same notwithstanding any defense, set-off or counterclaim whatsoever whether by reason of breach of the lease or otherwise which it may or might now or hereafter have as against the Lessor (the Lessee reserving its right to have recourse directly against the Lessor on account of any such defense, set-off or counterclaim); and

(b) That, subject to and without impairment of the Lessee's leasehold rights in and to the leased Equipment, Lessee holds said Equipment and the possession thereof for the Assignee to the extent of the Assignee's rights therein.

16. Lessor covenants to and with Lessee that except as herein provided, Lessor is the owner of the Equipment free from all encumbrances and that conditioned upon Lessee's performing the conditions hereof, Lessee shall peaceably and quietly hold, possess and use the Equipment during said term without let or hindrance.

17. There shall be deemed to be a breach of this lease (a) if Lessee shall default in the payment of any rent hereunder when due, (b) if Lessee shall default in the performance of any of the other covenants herein and such default shall continue unabated for five (5) days after written notice thereof to Lessee by Lessor or (c) if Lessee becomes insolvent, or if a petition in bankruptcy is filed by or against Lessee pursuant to any statute either of the United States or of any State (including a petition for reorganization, arrangement or an extension or for the appointment of a receiver or a trustee of all or a portion of Lessee's property), or if Lessee makes an assignment for the benefit of creditors, or if Lessee attempts to remove, sell, transfer, encumber, sublet or part with possession of the Equipment, or any part thereof. In the event of a breach of this lease as herein defined, Lessor may:

(a) Proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants and terms of this lease or to recover damages for the breach of such covenants and terms hereof; or

(b) By notice in writing to the Lessee terminate this lease, as to all or any of the items of Equipment leased hereunder, whereupon all right, title and interest of Lessee in or in the use of said items of Equipment shall absolutely cease and determine as though this lease had never been made; and thereupon Lessor may, directly or by its agents, enter upon the premises of Lessee or other premises where any of the said items of Equipment may be or be supposed to be and take possession thereof and thenceforth hold, possess and enjoy the same free from any right of Lessee or its successors or assigns, including any receiver, trustee in bankruptcy or creditor of Lessee, to hold or use said items of Equipment for any purposes whatever, but Lessor shall nevertheless have a right to recover from Lessee any and all amounts including rents which, under the terms of this lease may be then due and be unpaid hereunder for use of said items of Equipment together with any damages in addition thereto which Lessor shall have sustained by reason of the breach of any covenant or covenants of this lease, together with attorney's fees, as hereinafter provided, and such expenses as shall be expended or incurred in the seizure of items of Equipment or in the enforcement of any right or privilege hereunder or in any consultation or action in such connection. Lessor may sell the Equipment with notice, or without notice where permitted by law, at private or public sale, at which Lessor may purchase without having the Equipment at the sale, and the proceeds thereof less expenses of retaking, repairing, reselling and reasonable attorney's fees will be credited upon unpaid rentals, any surplus shall be paid to such persons, if any, who are entitled by law to receive such surplus from Lessor prior to Lessee, and any unpaid residue thereof to Lessee and any deficiency shall be paid by Lessee with interest. Lessor may, if it so desires, instead of selling the Equipment, as above provided, retain the Equipment in satisfaction of Lessee's obligations under this lease in accordance with the provisions of law relating thereto. In the event that Lessor shall upon default of lease refer said default to attorneys for commencement of legal action, there shall accrue and become owing to Lessor in addition to all other sums owing hereunder, an amount equal to twenty (20%) per cent of such sums as legal fees and expenses. No remedy of Lessor hereunder shall be exclusive of any other remedy herein or by law provided, but Lessor's remedies shall be cumulative. Failure on the part of Lessor to exercise any remedy shall not be deemed a waiver thereof, or of any default. Waiver of any default by Lessor shall not be deemed a waiver of any other or a subsequent default.

18. This lease shall automatically be renewed each year for a term of one year at the renewal specified in the schedule upon all the terms and conditions hereof unless Lessee gives to Lessor written notice of cancellation not less than thirty (30) days prior to the expiration of the preceding term.

19. All notices relating hereto shall be delivered in person to an officer of Lessor or Lessee or shall be mailed by registered mail to Lessor or Lessee at their respective addresses shown above or at such other address furnished in writing to the sender by the other party.

20. This lease is entered into and is to be construed in accordance with the laws of the State of New York and shall become effective only when same shall have been countersigned by an officer of the Lessor at its home office in New York.

21. Lessor has not made any representations of any kind, nature or description except as are in this lease specifically set forth and this lease contains all the terms and agreements entered into between the parties, and no representation, agreement, guaranty, warranty, waiver or change in this lease, not included herein, shall bind any assignee unless in writing signed by assignee.

22. Lessee will at request of Lessor execute any ancillary documents which Lessor may deem necessary to effect the purpose and intent of this agreement including financing statements pursuant to the Uniform Commercial Code. Lessee authorizes Lessor and or Lessor's assignee and any subsequent assignees to file a financing statement signed only by Lessor or assignee in all places where necessary to perfect Lessor's security interest or to sign such financing statement on behalf of Lessee.

IN WITNESS WHEREOF Lessor and Lessee have executed this lease as of the date and year first above written.

LESSEE WINKE-SMITH, INC.

BY _____

LEASING CONSULTANTS INCORPORATED

BY _____

Lessor

LEASING CONSULTANTS INCORPORATED
95-20 63rd Road Forest Hills, N.Y. 11374
212-275-1500

RIDER TO LEASE

Events of Default. In the event that: (a) Lessee shall default in the payment of any installment of rent or other sums payable hereunder for ten (10) days after the same is due: or (b) Lessee shall default in the observance or performance of any other covenant or agreement in this Agreement and such default shall continue for a period of fifteen (15) days after notice thereof to Lessee from Lessor; or (c) Lessee shall dissolve or become insolvent (however evidenced) or make a general assignment for the benefit of creditors, or any proceeding under any bankruptcy or insolvency statute or any laws relating to the relief of debtors be commenced by or against Lessee, or a receiver, trustee or liquidator shall be appointed of Lessee or of all or a substantial part of Lessee's assets, or an order, judgment or decree shall be entered by a court of competent jurisdiction and such order, judgment or decree shall continue unpaid and in effect for any period of sixty (60) consecutive days without a stay of execution, or any execution or writ or process shall be issued under any action or proceeding against Lessee whereby the Equipment may be taken or restrained; then and in any such event, Lessor may, without notice or demand, (i) immediately terminate this Agreement and Lessee's rights hereunder, and/or (ii) declare immediately due and payable all the rental installments and other sums forthwith due and payable as liquidated damages and not as a penalty and/or (iii) proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants of this Agreement or to recover damages for the breach thereof.

ACCEPTED BY:

ZINKE - SMITH, INC.

Date: JUNE 23, 1969

BY: _____
Donald L. Smith, President

CERTIFICATE OF CORPORATE RESOLUTION AUTHORIZING LEASE

I, the undersigned, Secretary of WINKE-SMITH, INC.

DO HEREBY CERTIFY that at a meeting of the Board of Directors of said Corporation, duly and regularly held on the 25th day of April 1967, a quorum being present, the following resolution was unanimously adopted and recorded in the minute book of the said Corporation, kept by me, and are in accordance with and pursuant to the charter and by-laws of said Corporation, and are now in full force and effect, to wit:

RESOLVED: that this Corporation enter into a lease or leases with LEASING CONSULTANTS, INCORPORATED covering equipment in amounts up to $ 150,000.00 and that it is further:

RESOLVED: that any officer of this Corporation may execute on its behalf an agreement of lease together with other documents required by said LEASING CONSULTANTS, INCORPORATED.

I further certify that the following are the duly elected officers and stockholders of said Corporation:

Office	Name	% of Ownership	Address
President	Donald L. Smith, Jr.	662/3%	
Vice President	Andrew B. Tommers, Jr.	-0-	
Secretary	E. W. Fletcher	-0-	
Treasurer	William K. Zinke	331/3%	

In witness whereof I have hereunto signed my name and affixed the seal of the Corporation by order of the Board of Directors thereof this 25th day of April 1967.

Secretary

Seal

I, the undersigned, President of the Corporation above named, do hereby certify that the foregoing certificate is in all respects true and contains a true copy of the resolution regularly adopted by the Board of Directors of said Corporation in the manner therein stated.

President

Consignee, lessee of the foregoing equipment pursuant to the terms and conditions of a lease thereof made by and between the consignee as lessee and LEASING CONSULTANTS, INCORPORATED as lessor hereby accepts delivery of same pursuant to said lease, and by such acceptance acknowledges that same in all respects complies with the requirements of said lease and is of the size, design, and capacity contracted for by consignee as such lessee.

This acknowledgement shall inure solely to the benefit of the aforementioned lessor and shall not in any manner be deemed to constitute the consignee as agent of lessor for the purpose of accepting delivery from the supplier.

ZINKE-SMITH, INC.

Lessee

E. W. Fletcher by Treasurer

Date April 25, 1967

Lease # 1016

Purchase order #

ASSIGNMENT

FOR VALUE RECEIVED, the undersigned, LEASING CONSULTANTS INCORPORATED, hereby sells, assigns, transfers and sets over unto THE CHASE MANHATTAN BANK (NATIONAL ASSOCIATION) (hereinafter called the "Bank"), its successors and assigns, all rentals, claims for rentals and other moneys due and to become due to the undersigned under and by virtue of a certain lease agreement dated , between the undersigned, as Lessor, and [redacted], as Lessee, together with all other rights, powers and remedies of the undersigned under said lease agreement, and together with all the right, title and interest of the undersigned in and to the property therein described as security for the payment of said rentals and other moneys, hereby granting full power to the Bank, either in its own name or in the name of the undersigned, to take all legal or other proceedings which the undersigned could have taken but for this assignment; provided, however, the undersigned shall remain liable to observe and perform all the covenants and obligations under said lease agreement and the Bank shall not be required or obligated in any manner to perform any of the obligations of the undersigned pursuant to said lease agreement by reason of this assignment. The Bank is irrevocably authorized, but not obligated, to exercise all rights and remedies and collect, compromise and release all rentals and other moneys payable under said lease agreement and to deal with said lease agreement in such manner and at such times as the Bank may, in its discretion, deem advisable.

After performance by the Lessee of said lease agreement of all its obligations in accordance with its terms thereunder, including payment in full of the rentals payable thereunder, said Bank shall have no further right to or interest in the property described in said lease agreement or the salvage value thereunder, if any, except the right to have recourse thereto or to the value of any proceeds thereof, to the extent of the interest of the undersigned or the Lessee therein, for application towards payment of any unpaid obligations of the undersigned or the Lessee, as the case may be, to the Bank.

This assignment is made pursuant to a certain Purchase Agreement dated June 23, 1967 , between the Bank and the undersigned and shall be construed in connection therewith. The undersigned hereby repeats all the warranties, covenants and provisions contained in said purchase agreement.

IN WITNESS WHEREOF, the undersigned has caused this assignment to be duly executed by its duly authorized officer on this 11th day of July , 1967.

LEASING CONSULTANTS INCORPORATED

By_____

STATE OF NEW YORK)
: ss.:
COUNTY OF Queens)

On the 11th day of July, before me personally came David Miller, to me known, who, being by me duly sworn, did depose and say that he resides at [illegible] Brooklyn NY; that he is Secretary of LEASING CONSULTANTS INCORPORATED, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument if such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

Notary Public

MARTIN MILLER
Notary Public, State of New York
No. 11-7519258
Qualified in Queens County
Commission Expires March 30, 1959

Answer and Counterclaim

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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73 Civ. 1205

THE CHASE MANHATTAN BANK (NATIONAL ASSOCIATION), (sued herein as "Chase Manhattan Bank, N.A."), by its attorney MATTHEW F. DONOHUE, answering the complaint served herein respectfully:

1. Denies each and every allegation contained in paragraphs numbered 7 and 9 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth or accuracy of each and every allegation contained in paragraphs numbered 1, 3 and 8 of the complaint.

3. Denies each and every allegation contained in paragraph numbered 2 of the complaint, except that it admits Chase is a national banking association duly organized and existing under the laws of the United States of America, with its principal office in the City, County and State of New York.

4. Denies each and every allegation contained in paragraph numbered 5 of the complaint except that it admits that on or about July 11, 1967, Leasing Consultants, Incorporated (hereinafter "LCI") assigned its right to rentals and all other monies due thereunder and further rights of LCI as lessor under the subject lease agreement to Chase, but not the obligations contained therein (all as described more fully in paragraph 4 of the complaint).

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. Pursuant to the Federal Aviation Act of 1958 (hereinafter "F.A.A."), there is no requirement that the lessor (LCI) or the secured party (Chase) file the subject lease.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

6. If filing the lease were mandatory pursuant to the F.A.A., or its promulgated regulations, the requirement would be solely for the protection of the lessee; failure to file would only be detrimental to this lessee as against subsequent purchasers or lessees.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

7. There is no requirement pursuant to, or provision under, the F.A.A., or its promulgated regulations for the filing of an assignment of a lease such as was executed herein.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

8. There is no requirement for the filing of a lease pursuant to the Uniform Commercial Code of the State of New York (hereinafter "U.C.C."), Article 9, a lease not being a secured transaction in which rights must be perfected by filing.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

9. Chase was not required to file the assignment of lease pursuant to the U.C.C. Chase perfected its security interest in the lease by possession of the lease.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

10. Chase filed all documents necessary to give notice of its security interest in the aircraft by duly filing its chattel mortgage and security agreement under the F.A.A.

As and For a Seventh Affirmative Defense

11. Plaintiff is equitably estopped from asserting against Chase the invalidity of, or any other infirmity pertaining to, the lease. In March of 1972, Chase commenced exercise of its rights pursuant to the lease to effect collection of the rentals unpaid as of that time, by seizing and attempting to sell the aircraft, at great expense and legal risk, with the full knowledge and tacit approval of the plaintiff.

12. Had plaintiff given notice of its claim to the rental payments, which Chase was endeavoring to collect by said seizure, and not consented thereto, Chase would not have attempted to recover said monies due it by the exercise of said rights, but merely allowed plaintiff to take possession of the aircraft as owner, subject to the rights of Chase as a lien creditor.

13. By plaintiff's approval and consent to the seizure and attempted sale, Chase changed its position by incurring great financial expense and exposing itself to enormous potential legal liability.

14. Plaintiff sat on his rights at that time by not objecting or advising Chase of his intention to object to the collection of rentals by Chase and should not now be allowed to assert the invalidity of, or any infirmity pertaining to, Chase collectig rent due under the lease.

As and For an Eighth Affirmative Defense

15. In or about February 1973, plaintiff exercised and asserted a right of complete ownership over the aircraft, by selling it to the lessee, without notice to Chase, thereby impliedly admitting that Chase's first mortgage on the aircraft had been fully satisfied.

16. If it is the position of the plaintiff that the monies received by Chase as rentals over the past two years are

monies to which Chase is not entitled, then, and in that event, the first mortgage of Chase on the aircraft is still viable, in that Chase is still owed monies pursuant to said mortgage and its underlying debt and is still in possession of a valid, perfected and viable security interest, i.e., by virtue of the chattel mortgage, and the sale of the aircraft by the plaintiff was in direct contravention of Chase's rights as mortgagee.

17. In the alternative, the sale by plaintiff is an admission that Chase had been fully and properly paid pursuant to the lease and that the chattel mortgage was merely security for a debt which no longer existed.

COUNTERCLAIM

The Chase Manhattan Bank (National Association) (hereinafter "Chase") by its attorney Matthew F. Donohue, complaining of the plaintiff herein in the nature of a counterclaim, respectfully states that:

18. On or about July 17, 1967, Chase filed a security agreement and chattel mortgage pursuant to the requirements of the F.A.A., thereby perfecting a first mortgage in the aircraft, as more fully described in the complaint herein.

19. In or about February 1973, plaintiff sold the aircraft without giving any notice to Chase.

20. This sale by plaintiff was either an admission that Chase's mortgage was no longer viable and no longer a valid lien on the aircraft, or was a sale in direct contravention of Chase's rights as a perfected lien creditor.

21. At the time of the sale, the aircraft had a true or fair market value in excess of $55,000.

22. If the plaintiff is successful in its main action and recovers a judgment in the amount of $53,460, plus interest,

as demanded in the complaint, then, and in that event, the plaintiff deprived Chase of its right to first monies from the sale of the plane by selling it without notice to Chase.

23. Upon information and belief, plaintiff sold the aircraft for $20,000; the difference between $20,000 and the true market value, $55,000, was clearly deemed paid by Devcon by virtue of rental payments made to Chase by Devcon, which the trustee credited toward the actual value of said aircraft.

24. Alternatively to paragraph numbered 23, plaintiff dissipated an asset (the aircraft) in which Chase had a perfected security interest, by accepting a price $35,000 below the fair market value of the aircraft.

25. By virtue of the above, if the plaintiff is successful in its main action and the defendant, by judgment, is required to pay over to the trustee the sum of $53,460, plus interest as demanded in the complaint, in that it represents monies to which Chase is not entitled, then, and in that event, Chase would be entitled, by virtue of its perfected security interest in the aircraft, to all monies realized by the sale of the aircraft, and damages for the dissipation of said asset, to the extent of the sum demanded in the complaint.

26. By virtue of the above, if the plaintiff is successful in its main action and the defendant's counterclaim is upheld then, and in that event, Chase is entitled to a judgment against the trustee for the sum of $20,000 (as the amount realized from the sale of said aircraft, and pursuant to Chase's first lien in said aircraft), plus interest from February 5, 1973, and for the sum of $35,000, being the difference between the sale price of the aircraft ($20,000) and the true market value ($55,000), plus appropriate interest, to the extent only, and in an amount similar to, any judgment rendered in behalf of plaintiff against defendant.

WHEREFORE, defendant demands that the complaint herein be dismissed, or in the alternative that judgment be granted against the plaintiff in the sum of $55,000 plus interest to the extent only, and in a like amount, of any judgment recovered by the plaintiff against the defendant.

Dated: New York, New York
April 12, 1973

MATTHEW F. DONOHUE
Attorney for Defendant

By: ROBERT F. TRAVIA
Robert F. Travia

1 New York Plaza
New York, New York 10004
676-3723

Reply

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

73 Civ. 1205

Plaintiff, George Feldman, as Trustee in Bankruptcy of Leasing Consultants Incorporated, bankrupt, replying to the counterclaim of defendant, Chase Manhattan Bank, (National Association), respectfully:

1. Denies the allegations contained in paragraph 18 of the counterclaim, except admits that defendant recorded a document denominated "Chattel Mortgage And Security Agreement" with the Administrator of the Federal Aviation Administration on or about July 19, 1967.

2. Denies the allegations contained in paragraphs 19, 20, 21, 22, 23, 24, 25, and 26.

FIRST DEFENSE

The counterclaim fails to state a claim against plaintiff upon which relief can be granted.

SECOND DEFENSE

Defendant released its mortgage interest in the aircraft prior to plaintiff's purported sale thereof.

Reply

THIRD DEFENSE

Defendant assigned its mortgage interest in the aircraft prior to plaintiff's purported sale thereof.

Dated: New York, New York
April 16, 1973

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff

By: DANIEL A. ZIMMERMAN

350 Fifth Avenue
New York, New York 10001
Tel.: (212) 736-1000

A-18

Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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73 Civ. 1205
(Bauman, J.)

Plaintiff moves the court as follows:

1. That it enter pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint and dismissing defendant's counterclaim on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the court, at the hearing on the motion, by examining the pleadings and the evidence before it, and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

Motion

This motion is based upon:

(a) Pleadings;

(b) Affidavit of Daniel A. Zimmerman, Esq. dated April __, 1973.

Dated: New York, New York
April 24, 1973

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff

By: s/ DANIEL A. ZIMMERMAN

350 Fifth Avenue
New York, New York 10001
Tel.: (212) 736-1000

To: Matthew F. Donohue
Attorney for Defendant
One New York Plaza
New York, New York 10004

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 1506, United States Court House, Foley Square, City of New York, on the 16th day of May, 1973, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff

By s/ DANIEL A. ZIMMERMAN

350 Fifth Avenue
New York, New York 10001

Statement of Material Facts Pursuant to General Rule 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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73 Civ. 1205
(Bauman, J.)

The following is plaintiff's statement of the material facts as to which there is no genuine issue to be tried:

1. On August 18, 1970 Leasing Consultants Incorporated ("LCI"), a New York corporation, filed a petition for arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Eastern District of New York.

2. By order dated October 16, 1970 LCI was adjudicated a bankrupt.

3. Plaintiff is the duly qualified and acting trustee in bankruptcy of the estate of LCI.

4. On or about April 25, 1967, LCI, as lessor, and Zinke-Smith, Inc. (presently known as Devcon International Corporation, and hereinafter "Devcon"), as lessee, executed a "lease agreement" covering a Cessna 411 aircraft.

5. On or about July 11, 1967, LCI executed an "assignment" in favor of defendant Chase Manhattan Bank (National Association), (hereinafter "Chase").

6. Said "assignment" covered the aforesaid lease between LCI and Devcon and all rentals due thereunder.

Statement of Material Facts Pursuant to General Rule 9(g)

7. Said "assignment" constituted a security agreement covering chattel paper.

8. The "assignment" was not filed for recordation with the Administrator of the Federal Aviation Administration (the "Administrator").

9. The "lease agreement" was not filed for recordation with the Administrator.

10. Chase received various rental payments pursuant to said assignment subsequent to the filing of the petition in bankruptcy on August 18, 1970; to wit:

a.	$2,430.40 — 08/24/70	i.	$ 2,430.40 — 05/11/71
b.	$2,430.40 — 09/24/70	j.	$ 2,430.40 — 05/24/71
c.	$2,430.40 — 10/26/70	k.	$ 2,430.40 — 07/01/71
d.	$2,430.40 — 11/23/70	l.	$ 2,430.40 — 07/27/71
e.	$2,430.40 — 12/29/70	m.	$ 2,430.40 — 10/14/71
f.	$2,430.40 — 02/04/71	n.	$ 2,430.40 — 10/14/71
g.	$2,430.40 — 02/22/71	o.	$ 2,430.40 — 12/22/71
h.	$2,430.40 — 03/24/71	p.	$18,000.00 — 01/15/73
	Total ----------		$54,456.00

11. On or about January 1, 1972, Devcon was in default under said lease by reason of its non-payment of rent due thereunder.

12. On or about July 12, 1967 LCI had executed a "Chattel Mortgage and Security Agreement" in favor of Chase covering the 411 Cessna aircraft.

13. Said "Chattel Mortgage and Security Agreement" was recorded with the Administrator on July 19, 1967.

14. Following Devcon's default under the lease, Chase seized the aircraft with the intention of selling it at public auction.

15. Thereupon, on March 20, 1972 Devcon commenced an action in the United States District Court for the South-

ern District of Florida entitled "DEVCON INTERNATIONAL CORPORATION, formerly ZINKE-SMITH, INC., Plaintiff vs. CHASE MANHATTAN BANK, H. J. GRAY CORPORATION, and LEASING CONSULTANTS INCORPORATED, Defendants", and numbered 72-429-CIV-JE, seeking (1) an order restraining the auction sale of the aircraft; (2) reformation of the "lease agreement" to include a purchase option in the sum of $10.00; and (3) specific performance of the purchase option.

16. An amended complaint was filed on May 17, 1972, substituting the plaintiff herein as a party defendant in lieu of LCI and adding a cause of action against Chase based upon the theory of wrongful seizure.

17. Chase and Devcon settled the controversy between them executing a "Stipulation of Dismissal With Prejudice as to Defendants, Chase Manhattan Bank and H. J. Gray Corporation" in January, 1973.

18. In furtherance of said settlement, Chase assigned all of its right, title and interest under the "Chattel Mortgage and Security Agreement" to Devcon.

19. Plaintiff and Devcon settled the controversy between them, executing a "Stipulation of Dismissal" in April, 1973.

20. In furtherance of said settlement the plaintiff transferred his right, title and interest in the Cessna 411 aircraft to Devcon.

Dated: New York, New York
April 24, 1973

HAHN, HESSEN, MARGOLIS & RYAN
Attorney for Plaintiff

By: s/ DANIEL A. ZIMMERMAN

350 Fifth Avenue
New York, New York 10001
Tel.: (212) 736-1000

Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

73 Civ 1205
(Bauman, J.)

DANIEL A. ZIMMERMAN, being duly sworn, deposes and says:

1. I am an attorney at law associated with the law firm of Hahn, Hessen, Margolis & Ryan, attorneys for George Feldman, as trustee in bankruptcy of Leasing Consultants Incorporated ("LCI"), bankrupt.

2. I am personally familiar with a certain law suit commenced in the United States District Court for the Southern District of Florida, Number 72-429-CIV-JE, entitled "Devcon International Corporation, formerly known as Zinke-Smith, Inc., plaintiff, against Chase Manhattan Bank, H. J. Gray Corporation and Leasing Consultants Incorporated, defendants", the progress thereof, and the events leading thereto.

3. In March, 1972, Chase, through its agent, H. J. Gray Corporation, seized a certain Cessna 411 aircraft which had been leased by LCI to Devcon International Corporation ("Devcon") in 1967. In response to this seizure, Devcon commenced said law suit. A copy of the complaint is attached, marked exhibit "A" and made a part hereof. Thereafter an amended complaint was served. A copy of

the amended complaint is attached, marked exhibit "B" and made a part hereof.

4. Thereafter Devcon and Chase agreed on a settlement which was embodied in a stipulation. A copy of the stipulation is attached, marked exhibit "C" and made a part hereof. Paragraph "2" of the stipulation declares:

> "In further consideration of the sum of $18,000 being paid to the Defendant, CHASE MANHATTAN BANK, by the Plaintiff, the Defendant, CHASE MANHATTAN BANK, hereby transfers, conveys, and passes all right, title, and interest in and to said aircraft under the Chattel Mortgage and Security Agreement executed between CHASE MANHATTAN BANK and LEASING CONSULTANTS INC. to the Plaintiff, DEVCON INTERNATIONAL CORPORATION."

5. An order was entered, based on said stipulation, dismissing the action as to Chase and H. J. Gray Corporation. A copy of the order is attached, marked exhibit "D" and made a part hereof.

6. Devcon and the trustee also agreed upon a settlement, which is embodied in a stipulation. A copy of this stipulation is attached, marked exhibit "E" and made a part hereof. Pursuant to this stipulation, the trustee transferred his right, title and interest in the Cessna aircraft to Devcon.

Dated: New York, New York
April 24, 1973

s/ DANIEL A. ZIMMERMAN
DANIEL A. ZIMMERMAN

Exhibit "A"

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

DEVCON INTERNATIONAL CORPORATION, formerly, ZINKE-SMITH, INC., *Plaintiff,* *vs* CHASE MANHATTAN BANK, H. J. GRAY CORPORATION, and LEASING CONSULTANTS INCORPORATED, *Defendants.*	No. 72-429-CIV-JE COMPLAINT

The Plaintiff sues the Defendants by alleging the following:

1. The Plaintiff, DEVCON INTERNATIONAL CORPORATION, formerly, ZINKE-SMITH, INC., was and is a Florida corporation having its principal place of business in the State of Florida (hereinafter called Devcon).

2. The Defendant, CHASE MANHATTAN BANK, is a nationally-chartered banking institution located in New York.

3. The Defendant, H. J. GRAY CORPORATION, is a New Jersey corporation, having its principal place of business in New Jersey, and doing business in the State of Florida.

4. The Defendant, LEASING CONSULTANTS INCORPORATED, is a New York corporation, having its principal place of business in New York, and doing business in the State of Florida.

5. On April 25, 1967, the Plaintiff, DEVCON, entered into an agreement to lease a Cessna 411 aircraft, registration

number N-3225-R, presently located in Ft. Lauderdale, Florida, from the Defendant, LEASING CONSULTANTS INCORPORATED, at $2,430.40 per month for five years (Exhibits A and B).

6. As part of the lease agreement between the two parties, the Defendant, LEASING CONSULTANTS INCORPORATED, agreed to provide the Plaintiff, DEVCON, with an option to purchase the aforementioned aircraft at the termination of the lease in consideration for payment by the Plaintiff of one dollar.

7. Due to mutual mistake in expression and inadvertance, the written lease between the parties does not contain the Plaintiff's option to purchase the aircraft, even though a purchase option agreement was mailed to the Plaintiff, who inadvertantly failed to execute it.

8. On or about July 12, 1967, the Defendant, LEASING CONSULTANTS, INC., executed a chattel mortgage and security agreement on the said aircraft in favor of the Defendant, CHASE MANHATTAN BANK.

9. The Plaintiff, DEVCON, after July 12, 1967, proceeded to make lease payments on said aircraft to the Defendant, CHASE MANHATTAN BANK.

10. On October 8, 1971, the Plaintiff, DEVCON, attempted to exercise its purchase option on the aircraft and purchase the aircraft, by paying the balance due on the lease to the Defendants, CHASE MANHATTAN BANK and LEASING CONSULTANTS, INC.

11. The Plaintiff, DEVCON, was subsequently informed that there was no formal purchase option agreement in writing, and the Defendants would not honor the Plaintiff's purchase option on the aircraft and they refused to accept

the Plaintiff's tender of lease payments and transfer title of the aircraft to the Plaintiff, DEVCON.

12. On or about November, 1971, the Plaintiff, DEVCON, in response to the Defendants' refusal to recognize and honor the Plaintiff's purchase option, stopped making lease payments on the said aircraft, since the very reason the Plaintiff entered into the lease was to ultimately purchase the aircraft by exercising its option.

13. At the time the Plaintiff, DEVCON, stopped making payments on the lease, the balance due on the lease was $14,582.40 out of an original total due of $145,824.00.

14. On or about March 15, 1972, the Plaintiff, DEVCON, was informed by the Defendant, CHASE MANHATTAN BANK, that it was exercising its rights pursuant to the chattel mortgage and security agreement executed by the Defendant, LEASING CONSULTANTS, INC., in seizing the said aircraft leased to the Plaintiff. The Plaintiff, DEVCON, was further informed that the aircraft would be sold at public auction, which the Plaintiff in good faith and on sound information believes will take place on or before March 23, 1972, and said aircraft will be sold at the public auction by Defendants, H. J. GRAY CORPORATION, CHASE MANHATTAN BANK's agent for purposes of seizure and sale. Such public sale will cause irreparable injury and result in unjust enrichment to the Defendants.

15. WHEREFORE the Plaintiff, DEVCON, seeks the Court to issue a temporary restraining order enjoining the sale of the aforedescribed Cessna aircraft at public auction to reform the lease agreement to make it conform to the true agreement of the parties, wherein it was contemplated and agreed upon that the Plaintiff, DEVCON, shall have a purchase option on the aircraft; to issue a mandatory injunction that the Defendants transfer title to the said aircraft to the Plaintiff upon payment by the Plaintiff of the balance

due on the lease in accord with the purchase option; and to entitle the Plaintiff to specific performance of the purchase option on the aircraft.

DATED this 20 day of March, 1972.

PODHURST, ORSECK & PARKS, P.A.
Attorneys for Plaintiff
66 West Flagler Street
Miami, Florida 33130

By _____
AARON PODHURST

By _____
EDWARD I. STERNLIEB

[illegible] CONSULTANTS INCORPORATED
95-20 63rd Road, Forest Hills, N.Y. 11374
212-275-1500

LEASE NO. 1016

THIS LEASE made this 25 day of April [illegible] [illegible]SING CONSULTANTS INCORPORATED, a New York corporation, hereinafter called the "Lessor" and

Zinke-Smith, Inc.

hereinafter called the "Lessee":

WITNESSETH:

In consideration of the mutual covenants and premises hereinafter contained, the parties hereto agree as follows:

1. Lessor hereby leases to Lessee and Lessee hereby hires and leases from [illegible] the machinery, equipment and property (hereinafter refered to as the "Equipment") described in the schedule and/or schedules hereafter executed by the par[illegible] and made a part hereof, for the term as fixed in the schedule and/or schedules annexed hereto.

2. The Lessee agrees to pay rent to the Lessor for the use of the Equipment [illegible] rate and in the manner set forth in the schedule and/or schedules annexed and to be annexed hereto, together with the additional rent provided for herein.

3. Lessor agrees to cause the Equipment to be delivered to the Lessee, and Lessee agrees to assume all risks of loss or damage to the Equipment occurring during the delivery of the Equipment to Lessee. Lessor assumes no liability for loss or damage occurring during delivery or arising from late delivery or non-fulfillment of the agreement by reason of fires, strikes delays in transportation, failure of any supplier with whom Lessor has contracted to furnish any or all of such Equipment to the Lessee, or any cause beyond the control of Lessor. Lessor shall not be liable for specific performance of this lease but delay of delivery of Equipment shall not affect the validity of this lease.

4. Lessee agrees that the Equipment shall be kept and used by the Lessee at the location specified on the schedule or, if not therein specified, at the address of the Lessee as hereinabove set forth. The Equipment shall be used solely in the conduct of Lessee's business and shall not be assigned or sublet or used by others than Lessee or its employees. The Equipment shall not be removed from the locations herein specified without the consent of Lessor granted in writing. Lessee shall immediately and firmly attach in a suitable location on the Equipment a metal plate furnished by Lessor and inscribed, "Property of Leasing Consultants, Inc.", or its assignee, as the case may be. The Lessee shall not mar, deface, mutilate, remove or in any way interfere with the said metal plate and shall notify the Lessor if it should become lost or illegible.

5. In addition to the rent provided for in the schedule annexed hereto, Lessee shall pay as additional rent an amount equal to the actual transportation costs of such Equipment FOB plant designated by the supplier of said Equipment, which costs shall be added to and become part of the rental payable with the initial installment of rent, and any insurance charges paid by Lessor under the provisions of Paragraph 12 of this lease. Should Lessee fail to pay rent due hereunder within ten days after same shall accrue and become payable, then in such event Lessee shall pay to Lessor late charges equal to five cents (5¢) for each dollar of rental payment in arrears per month. Initial rental payment following delivery of Equipment shall be apportioned so as to make uniform the due dates of rental payment for all equipment and to make all later rental payments payable on the first day of each month thereafter.

6. Lessee shall at its own cost and expense:

(a) Provide and pay for electric power, servicing and maintenance for the Equipment including repairs, parts, supplies, labor and tools as may be required.

(b) Maintain the Equipment in good working order, repair and appearance and, when not in use, keep the Equipment in a protected area, and shall, in effecting maintenance and repairs, have such work performed only by qualified persons who are satisfactory to Lessor.

7. Lessee shall not without the prior written approval of Lessor affix or install any accessory, attachment or other device to the Equipment leased hereunder. All repairs, replacements, parts, supplies, accessories, attachments and devices furnished or affixed to the Equipment by Lessee shall thereupon, unless otherwise agreed in writing, become the property of the Lessor.

8. Lessee shall cause the Equipment to be operated only by competent operators and shall pay all expenses of operation.

9. Lessor shall not be required to make any repairs to the Equipment or to replace the Equipment or any of its parts, attachments or accessories. Lessor shall not be liable to Lessee for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment leased hereunder or by the use or maintenance thereof or repairs, servicing or adjustments thereto or by any delay or failure to provide the same or by any interruption or loss of use thereof or for any loss of business or damage whatsoever and howsoever caused.

10. Upon the expiration of the term or sooner termination of this lease, Lessee shall, at its own cost and expense, return the Equipment to the Lessor at Lessor's place of business, or at such place packed and ready for shipment as Lessor may specify.

11. Lessee assumes all risk and liability for, and agrees to save and hold Lessor harmless in respect to, each item of the Equipment leased hereunder and for the use, operation, storage and return delivery thereof to Lessor and damages for injuries and death to persons and property howsoever arising therefrom or because thereof, and Lessee shall save and hold Lessor harmless from any and all of the following, whether the same be actual or alleged: all claims and liens for storage, labor and materials and all loss of and damage to the Equipment and all loss, damage, claims, penalties, liability and expense including attorney's fees, howsoever arising or incurred because of the Equipment or the return delivery to Lessor, or the storage, maintenance, use or operation thereof, and other claims arising in connection with the manufacture, selection, purchase, delivery, possession, use and operation of same and from any claims arising under insurance policies covering said equipment.

12. Lessee at its own expense shall keep each item of the Equipment insured at the full insurable value thereof against fire and theft and under extended coverage or "all risk" type of insurance, with losses, if any, payable to Lessor or its assignees as their interest may appear. All insurance shall be in amounts and companies as shall be acceptable to Lessor. Lessee shall promptly, at the request of the Lessor, deliver to Lessor evidence of said insurance together with receipt for the premiums thereunder. If Lessee shall fail to provide the insurance protection required hereunder or fail to pay the premiums therefor, Lessor may insure the Equipment at Lessee's expense and any premium or premiums so paid by Lessor shall be repaid by Lessee with interest at the legal rate within thirty (30) days thereafter, and failure to do so shall be deemed to be a breach of this lease. Each policy shall expressly provide that such insurance as to Lessor and its assigns shall not be invalidated by any act, omission or neglect of Lessee. Lessor may apply proceeds of such insurance to replace or repair the equipment and/or to satisfy Lessee's obligations hereunder, or may require that Lessee so replace the same with equipment of like nature and in good repair. No loss, theft, damage or destruction of the Equipment shall relieve Lessee of the obligation to pay rent or any other obligation under this lease. If Lessor determines that any item of Equipment is lost, stolen, destroyed or damaged beyond repair, Lessor may, in lieu of the foregoing, require that Lessee pay Lessor in cash all sums then owed by Lessee to Lessor under this lease, together with the unpaid balance of the total rent of said item or items of Equipment for the pending term of this lease and an amount equal to ten (10%) per cent of the actual cost of said

Exhibit "A"

item, whereupon Lessee shall assign to Lessor without warranty expressed or implied its right, title and interest in such Equipment. The parties hereto agree that the said sums will equal the fair value of such item on the date of such loss, theft, damage or destruction.

13. Lessee shall comply with and conform to all laws and regulations relating to the ownership, possession, use or maintenance of the Equipment and save Lessor harmless against actual or asserted violations, and pay all costs and expenses of every character occasioned by or arising out of such use, and pay promptly when due all taxes and other public charges against or upon the Equipment. Lessee shall pay all charges and taxes (local, State and Federal) which may now or hereafter be imposed upon the ownership, leasing, rental, sale, purchase, possession or use of the Equipment.

14. This is an agreement of lease only, and nothing herein shall be construed as conveying to Lessee any right, title or interest in or to the Equipment leased hereunder except as a lessee only. Title to the Equipment shall at all times remain in Lessor. Lessee shall at all times protect and defend, at its own cost and expense, the title of Lessor from and against all claims, liens and legal processes of creditors of Lessee and shall keep all of the Equipment free and clear of such claims, liens and processes.

15. This lease and all rights of Lessor hereunder shall be assignable by Lessor without the consent of Lessee and without prior notice to the Lessee but Lessee shall not be under any obligation to any assignee of Lessor except after written notice of such assignment from Lessor. Without the prior written consent of Lessor, Lessee shall not assign this lease or its interest thereunder or enter into any sublease with respect to the Equipment covered thereby. Any assignees of Lessor shall be entitled to all rights and remedies herein conferred on Lessor, but Lessor will not thereby become such assignee's agent. Lessee will settle all claims against Lessor directly with Lessor. Lessor hereby agreeing to remain responsible therefor, and Lessee will not set up any claim or defense against any assignee of Lessor. Without limiting the generality of the foregoing, the Lessee agrees that the Lessor may assign all right, title and interest of Lessor in and to all monies due and to become due to Lessor hereunder to a financing institution (hereinafter called Assignee), consents to any such assignment and, in the event of such assignment, Lessee agrees with the Lessor as follows:

(a) That its obligation to pay directly to the Assignee the amounts (whether designated as rentals or otherwise) which become due from the Lessee hereunder shall be absolutely unconditional and those amounts (or, on failure to pay those amounts, monies equal to those amounts) shall be payable to the Assignee by the Lessee whether or not this lease is terminated by operation of law or otherwise, and the Lessee promises so to pay the same notwithstanding any defense, set off or counterclaim whatsoever whether by reason of breach of the lease or otherwise which it may or might now or hereafter have as against the Lessor (the Lessee reserving its right to have recourse directly against the Lessor on account of any such defense, set-off or counterclaim); and

(b) That, subject to and without impairment of the Lessee's leasehold rights in and to the leased Equipment, Lessee holds said Equipment and the possession thereof for the Assignee to the extent of the Assignee's rights therein.

16. Lessor covenants to and with Lessee that except as herein provided, Lessor is the owner of the Equipment free from all encumbrances and that conditioned upon Lessee's performing the conditions hereof, Lessee shall peaceably and quietly hold, possess and use the Equipment during said term without let or hindrance.

17. There shall be deemed to be a breach of this lease (a) if Lessee shall default in the payment of any rent hereunder when due, (b) if Lessee shall default in the performance of any of the other covenants herein and such default shall continue uncured for five (5) days after written notice thereof to Lessee by Lessor or (c) if Lessee becomes insolvent, or if a petition in bankruptcy is filed by or against Lessee pursuant to any statute either of the United States or of any State (including a petition for reorganization, arrangement or an extension or for the appointment of a receiver or a trustee of all or a portion of Lessee's property), or if Lessee makes an assignment for the benefit of creditors, or if Lessee attempts to remove, sell, transfer, encumber, sublet or part with possession of the Equipment, or any part thereof. In the event of a breach of this lease as herein defined, Lessor may:

(a) Proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants and terms of this lease or to recover damages for the breach of such covenants and terms hereof; or

(b) By notice in writing to the Lessee terminate this lease, as to all or any of the items of Equipment leased hereunder, whereupon all the right, title and interest of Lessee to or in the use of said items of Equipment shall absolutely cease and determine as though this lease had never been made, and thereupon Lessor may, directly or by its agents, enter upon the premises of Lessee or other premises where any of the said items of Equipment may be or be supposed to be and take possession thereof and thenceforth hold, possess and enjoy the same free from any right of Lessee or its successors or assigns, including any receiver, trustee in bankruptcy or creditor of Lessee, to hold or use said items of Equipment for any purpose whatever; but Lessor shall nevertheless have a right to recover from Lessee any and all amounts including rents which, under the terms of this lease may be then due and be unpaid hereunder for use of said items of Equipment together with any damages in addition thereto which Lessor shall have sustained by reason of the breach of any covenant or covenants of this lease, together with attorney's fees, as hereinafter provided, and such expenses as shall be expended or incurred in the seizure of items of Equipment or in the enforcement of any right or privilege hereunder or in any consultation or action in such connection. Lessor may sell the Equipment with notice, or without notice where permitted by law, at private or public sale, at which Lessor may purchase without having the Equipment at the sale, and the proceeds thereof less expenses of retaking, repairing, reselling and reasonable attorney's fees will be credited upon unpaid rentals; any surplus shall be paid to such persons, if any, who are entitled by law to receive such surplus from Lessor prior to Lessee, and any unpaid residue thereof to Lessee and any deficiency shall be paid by Lessee with interest. Lessor may, if it so desires, instead of selling the Equipment, as herein provided, retain the Equipment in satisfaction of Lessee's obligations under this lease in accordance with the provisions of law relating thereto. In the event Lessor shall upon default of lease refer said default to attorneys for commencement of legal action, there shall accrue and become owing to Lessor in addition to any other sums owing hereunder, an amount equal to twenty (20%) per cent of such sums as legal fees and expenses. No remedy of Lessor hereunder shall be exclusive of any other remedy herein or by law provided, but Lessor's remedies shall be cumulative. Failure on the part of Lessor to exercise any remedy shall not be deemed a waiver thereof, or of any default. Waiver of any default by Lessor shall not be deemed a waiver of any other or a subsequent default.

18. This lease shall automatically be renewed each year for a term of one year at the renewal specified in the schedule upon all the terms and conditions hereof unless Lessee gives to Lessor written notice of cancellation not less than thirty (30) days prior to the expiration of the preceding term.

19. All notices relating hereto shall be delivered in person to an officer of Lessor or Lessee or shall be mailed by registered mail to Lessor or Lessee at their respective addresses shown above or at such other address furnished in writing to the sender by the other party.

20. This lease is entered into and is to be construed in accordance with the laws of the State of New York and shall become effective only when same shall have countersigned by an officer of the Lessor at its home office in New York.

21. Lessor has not made any representations of any kind, nature or description except as are in this lease specifically set forth and this lease contains all the terms and agreements entered into between the parties, and no representation, agreement, guaranty, warranty, waiver or change in this lease, not included herein, shall be of any assignee unless in writing signed by assignee.

22. Lessee will at request of Lessor execute any ancillary documents which Lessor may deem necessary to effect the purpose and intent of this agreement including financing statements pursuant to the Uniform Commercial Code. Lessee authorizes Lessor and/or Lessor's assignee and any subsequent assignee to file a financing statement signed only by Lessor or assignee in all places where necessary to perfect Lessor's security interest or to sign such financing statement on Lessee's behalf.

IN WITNESS WHEREOF Lessor and Lessee have executed this lease as of the date and year first above written.

LESSEE ZINKE-SMITH, INC.

BY _____

LEASING CONSULTANTS INCORPORATED

BY _____

LEASING CONSULTANTS INCORPORATED
95-20 63rd Road, Forest Hills, N.Y. 11374
212-275-1500

SCHEDULE

TO LEASE NO. _____ DATED May 17, 1967 BETWEEN LEASING CONSULTANTS INCORPORATED, AS LESSOR AND AS LESSEE

All terms and conditions of said lease are in full force and effect with respect to this schedule.

A. Equipment:

Cessna 411, N-7225-R

B. Lessee agrees that each unit leased hereunder is of a size, design and capacity selected by Lessee and that Lessee is satisfied that the same is suitable for its purposes and that Lessor has made no representation or warranty with respect to the suitability or durability of any such unit for the purposes and uses of Lessee, or any other representation or warranty, express or implied, with respect thereto, or otherwise, Lessor shall not be liable to Lessee for any loss, damage or expense of any kind or nature caused, directly or indirectly, by any unit leased hereunder, or the use or maintenance thereof, or the repairs, servicing or adjustments thereto, or by any delay or failure to provide any thereof, or by any interruption of service or loss of use thereof, or for any loss of business or damage whatsoever and howsoever caused.

C. Term: 5 years (sixty months)

D. For the use of the above listed Equipment the Lessee hereby agrees to pay the Lessor at the following rate and manner: $2,430.40 Monthly, payable in Advance

E. In accordance with paragraph 7 of lease, the Lessee shall also obtain and pay for public liability insurance with limits of One Million Dollars ($1,000,000.00) (single limit) and against damages or claims therefor for property damage in the amount of One Million Dollars ($1,000,000.00) (single limit) or certificate of insurance indicating such coverage. Lessee will undertake to defend and pay for all legal and other expenses including attorney's fees in connection with any suit brought against the Lessor by reason of any such claims for damages for personal injuries, death or property damage.

F. The Lessor acknowledges receipt of the sum of $4,860.80 Third July 17, 1967 xxxxxxx The month's rent will be due and payable after shipment and thereafter on the same day of each month for the term of this agreement all monthly payments will become due and payable.

G. The Lessee may, by notice in writing to the Lessor at its principal place of business given not less than thirty (30) days prior to the expiration of this schedule, continue to rent the said equipment at a six month rental of $2,430.40 payable in advance.

H. The Lessor is hereby given the right and privilege upon reasonable prior notice to the Lessee and during Lessee's regular business hours to inspect said Equipment on the premises of the Lessee or wherever the Equipment is located. The Equipment shall be kept by the Less at the following location(s):

I. The Equipment shall be kept at the above location(s) at all times during the continuance of this lease and shall not be removed therefrom without written permission of the Lessor.

J. This schedule shall be deemed to have been made in New York State and shall be interpreted under the laws of the State of New York.

ACCEPTED as a Schedule to and as a part of the above numbered lease this 17th day of May 19 67

LESSEE ZINKE - SMITH, INC.

BY Donald L. Smith, President

LEASING CONSULTANTS INCORPORATED

BY _____

EXHIBIT "B"

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

[SAME TITLE]

NO. 72-429-CIV-JE

Amendments to Complaint

The Plaintiff amends the Complaint by adding the following paragraphs:

4a. The jurisdiction of this Court is based upon diversity of citizenship of the parties, and the amount in controversy is in excess of $10,000.00, exclusive of interest and costs.

5a. The net market value of the Cessna 411 aircraft is in excess of $10,000.00.

DATED this 21st day of March, 1972.

PODHURST, ORSECK & PARKS
Attorneys for Plaintiff
66 West Flagler Street
Miami, Florida 33130

By AARON PODHURST
AARON PODHURST

By EDWARD I. STERNLIEB
EDWARD I. STERNLIEB

Exhibit "B"

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

DEVCON INTERNATIONAL CORPORATION, formerly, ZINKE-SMITH, INC., *Plaintiff,* vs. CHASE MANHATTAN BANK, H. J. GRAY CORPORATION, and GEORGE FELDMAN, as Trustee for LEASING CONSULTANTS INCORPORATED, Bankrupt, *Defendants.*	No. 72-429-Civ-JE AMENDED COMPLAINT

The Plaintiff sues the Defendants by alleging the following:

1. The Plaintiff, DEVCON INTERNATIONAL CORPORATION, formerly, ZINKE-SMITH, INC., was and is a Florida corporation having its principal place of business in the State of Florida (hereinafter called DEVCON).

2. The Defendant, CHASE MANHATTAN BANK, is a nationally chartered banking institution located in New York, and having its principal place of business in New York.

3. The Defendant, H. J. GRAY CORPORATION, is a New Jersey corporation, having its principal place of business in New Jersey, and doing business in the State of Florida.

4. The Defendant, GEORGE FELDMAN, is the Trustee for LEASING CONSULTANTS INCORPORATED, a bankrupt New York corporation, having its principal place of business in New York, and doing business in the State of Florida.

Exhibit "B"

5. The jurisdiction of this Court is based on diversity of citizenship of the parties, and the amount in controversy is in excess of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

COUNT I

6. On April 25, 1967, the Plaintiff, DEVCON, entered into an agreement to lease a Cessna 411 aircraft, registration number N-3225-R, presently located in Ft. Lauderdale, Florida, from LEASING CONSULTANTS INCORPORATED, at $2,430.40 per month for five years (Exhibits A and B). The net market value of the Cessna 411 aircraft is in excess of Ten Thousand ($10,000) Dollars.

7. As part of the lease agreement between the two parties, LEASING CONSULTANTS INCORPORATED agreed to provide the Plaintiff, DEVCON, with an option to purchase the aforementioned aircraft at the termination of the lease in consideration for payment by the Plaintiff of one dollar.

8. Due to mutual mistake in expression and inadvertence, the written lease between the parties does not contain the Plaintiff's option to purchase the aircraft, even though a purchase option agreement was mailed to the Plaintiff, who inadvertently failed to execute it.

9. On or about July 12, 1967, LEASING CONSULTANTS, INC., executed a chattel mortgage and security agreement on the said aircraft in favor of the Defendant, CHASE MANHATTAN BANK.

10. The Plaintiff, DEVCON, after July 12, 1967, proceeded to make lease payments on said aircraft to the Defendant, CHASE MANHATTAN BANK.

11. On October 8, 1971, the Plaintiff, DEVCON, attempted to exercise its purchase option on the aircraft and purchase the aircraft, by paying the balance due on the lease to the

Exhibit "B"

Defendants, CHASE MANHATTAN BANK and LEASING CONSULTANTS, INC.

12. The Plaintiff, DEVCON, was subsequently informed that there was no formal purchase option agreement in writing, and the Defendants would not honor the Plaintiff's purchase option on the aircraft and they refused to accept the Plaintiff's tender of lease payments and transfer title of the aircraft to the Plaintiff, DEVCON.

13. On or about November, 1971, the Plaintiff, DEVCON, in response to the Defendants' refusal to recognize and honor the Plaintiff's purchase option, stopped making lease payments on the said aircraft, since the very reason the Plaintiff entered into the lease was to ultimately purchase the aircraft by exercising its option.

14. At the time the Plaintiff, DEVCON, stopped making payments on the lease, the balance due on the lease was $14,582.40 out of an original total due of $145,824.00.

15. On or about March 15, 1972, the Plaintiff, DEVCON, was informed by the Defendant, CHASE MANHATTAN BANK, that it was exercising its rights pursuant to the chattel mortgage and security agreement executed by the Defendant, LEASING CONSULTANTS, INC., in seizing the said aircraft leased to the Plaintiff. The Plaintiff, DEVCON, was further informed that the aircraft would be sold at public auction, which the Plaintiff in good faith and on sound information believes will take place on or before March 23, 1972, and said aircraft will be sold at the public auction by Defendants, H. J. GRAY CORPORATION, CHASE MANHATTAN BANK's agent for purposes of seizure and sale. Such public sale will cause irreparable injury and result in unjust enrichment to the Defendants.

16. The Plaintiff, DEVCON, stands ready, willing and able to tender all lease payments due CHASE MANHATTAN BANK on the lease involved in this lawsuit.

Exhibit "B"

17. WHEREFORE the Plaintiff, DEVCON, seeks the Court to issue a temporary restraining order enjoining the sale of the aforedescribed Cessna aircraft at public auction; to reform the lease agreement to make it conform to the true agreement of the parties, wherein it was contemplated and agreed upon that the Plaintiff, DEVCON, shall have a purchase option on the aircraft; to issue a mandatory injunction that the Defendants transfer title to the said aircraft to the Plaintiff upon payment by the Plaintiff of the balance due on the lease in accord with the purchase option; and to entitle the Plaintiff to specific performance of the purchase option on the aircraft.

COUNT II

18. The Plaintiff repeats and realleges all allegations contained heretofore.

19. The Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION, violated and failed to comply with the provisions and terms of the lease involved in this lawsuit by seizing the aforedescribed Cessna aircraft from the Plaintiff without first providing notice in writing to the Plaintiff, DEVCON, terminating the lease.

20. Neither the Plaintiff nor any of its officers or employees have ever received by Registered Mail and/or Hand Delivery any notice in writing terminating the lease involved in this lawsuit.

21. The Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION, by illegally seizing the leased aircraft in the possession of the Plaintiff, DEVCON, have converted the leasehold interest and rights of the Plaintiff in said aircraft.

22. WHEREFORE the Plaintiff, DEVCON, seeks damages for conversion against the Defendants, CHASE MANHATTAN

Exhibit "B"

BANK and H. J. GRAY CORPORATION, in an amount in excess of the minimal jurisdictional limits of this Court, including but not limited to expenses and attorneys' fees incurred in seeking a temporary restraining order to prevent the sale of an illegally seized aircraft and in seeking the return of said aircraft to its rightful possessor, and loss of use of the aircraft during the time of this illegal seizure of the Defendants. The Plaintiff demands trial by jury of all issues triable as of right by a jury.

DATED: May __, 1972.

PODHURST, ORSECK & PARKS, P.A.
Attorneys for Plaintiff
66 West Flagler Street
Miami, Florida 33130

By AARON PODHURST
Aaron Podhurst

By EDWARD I. STERNLIEB
Edward I. Sternlieb

[illegible] CONSULTANTS INCORPORATED
95-20 63rd Road, Forest Hills, N.Y. 11374
212-275-1500

LEASE NO. 1016

THIS LEASE made this 25 day of April 19[illegible] [illegible] LEASING CONSULTANTS INCORPORATED, a New York corporation, hereinafter called the "Lessor" and

Zinke-Smith, Inc.

hereinafter called the "Lessee":

WITNESSETH:

In consideration of the mutual covenants and promises hereinafter contained, the parties hereto agree as follows:

1. Lessor hereby leases to Lessee and Lessee hereby hires and leases from [illegible] the machinery, equipment and property (hereinafter refered to as the "Equipment") described in the schedule and/or schedules hereafter executed by the par[illegible] and made a part hereof, for the term as fixed in the schedule and/or schedules annexed hereto.

2. The Lessee agrees to pay rent to the Lessor for the use of the Equipment [illegible] the rate and in the manner set forth in the schedule and/or schedules annexed and to be annexed hereto, together with the additional rent provided for herein.

3. Lessor agrees to cause the Equipment to be delivered to the Lessee, and Lessee agrees to assume all risks of loss or damage to the Equipment occurring during the delivery of the Equipment to Lessee. Lessor assumes no liability for loss or damage occurring during delivery or arising from late delivery or non-fulfillment of the agreement by reason of fires, strikes delays in transportation, failure of any supplier with whom Lessor has contracted to furnish any or all of such Equipment to the Lessee, or any cause beyond the control of Lessor. Lessor shall not be liable for specific performance of this lease but delay of delivery of Equipment shall not affect the validity of this lease.

4. Lessee agrees that the Equipment shall be kept and used by the Lessee at the location specified on the schedule or, if not therein specified, at the address of the Lessee as hereinabove set forth. The Equipment shall be used solely in the conduct of Lessee's business and shall not be [illegible] by others than Lessee or its employees. The Equipment shall not be removed from the locations herein specified without the consent of Lessor granted in writing. Lessee shall immediately and firmly attach in a suitable location on the Equipment a metal plate furnished by Lessor and inscribed, "Property of Leasing Consultants, Inc.", or its assignee, as the case may be. The Lessee shall not hide, deface, mutilate, remove or in any way interfere with the said metal plate and shall notify the Lessor if it should become lost or illegible.

5. In addition to the rent provided for in the schedule annexed hereto, Lessee shall pay as additional rent an amount equal to the actual transportation costs of such Equipment FOB plant designated by the supplier of said Equipment, which costs shall be added to and become part of the rental payable with the initial installment of rent, and any insurance charges paid by Lessor under the provisions of Paragraph 12 of this lease. Should Lessee fail to pay rent due hereunder within ten days after same shall accrue and become payable, then in such event Lessee shall pay to Lessor late charges equal to five cents (5¢) for each dollar of rental payment in arrears per month. Initial rental payment following delivery of Equipment shall be apportioned so as to make uniform the due dates of rental payment for all equipment and to make all later rental payments payable on the first day of each month thereafter.

6. Lessee shall at its own cost and expense:

(a) Provide and pay for electric power, servicing and maintenance for the Equipment including repairs, parts, supplies, labor and tools as may be required.

(b) Maintain the Equipment in good working order, repair and appearance and, when not in use, keep the Equipment in a protected area, and shall, in effecting maintenance and repairs, have such work performed only by qualified persons who are satisfactory to Lessor.

7. Lessee shall not without the prior written approval of Lessor affix or install any accessory, attachment or other device to the Equipment leased hereunder. All repairs, replacements, parts, supplies, accessories, attachments and devices furnished or affixed to the Equipment by Lessee shall thereupon, unless otherwise agreed in writing, become the property of the Lessor.

8. Lessee shall cause the Equipment to be operated only by competent operators and shall pay all expenses of operation.

9. Lessor shall not be required to make any repairs to the Equipment or to replace the Equipment or any of its parts, attachments or accessories. Lessor shall not be liable to Lessee for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment leased hereunder or by the use or maintenance thereof or repairs, servicing or adjustments thereto or by any delay or failure to provide the same or by any interruption or loss of use thereof or for any loss of business or damage whatsoever and howsoever caused.

10. Upon the expiration of the term or sooner termination of this lease, Lessee shall, at its own cost and expense, return the Equipment to the Lessor at Lessor's place of business, or at such place packed and ready for shipment as Lessor may specify.

11. Lessee assumes all risk and liability for, and agrees to save and hold Lessor harmless in respect to, each item of the Equipment leased hereunder and for the use, operation, storage and return delivery thereof to Lessor and damages for injuries and death to persons and property howsoever arising therefrom or because thereof, and Lessee shall save and hold Lessor harmless from any and all of the following, whether the same be actual or alleged: all claims and liens for storage, labor and materials and all loss of and damage to the Equipment and all loss, damage, claims, penalties, liability and expense including attorney's fees, howsoever arising or incurred because of the Equipment or the return delivery to Lessor, or the storage, maintenance, use or operation thereof, and other claims arising in connection with the manufacture, selection, purchase, delivery, possession, use and operation of same and from any claims arising under insurance policies covering said equipment.

12. Lessee at its own expense shall keep each item of the Equipment insured at the full insurable value thereof against fire and theft and under extended coverage or "all risk" type of insurance, with losses, if any, payable to Lessor or its assignees as their interest may appear. All insurance shall be in amounts and companies as shall be acceptable to Lessor. Lessee shall promptly, at the request of the Lessor, deliver to Lessor evidence of said insurance together with receipt for the premiums thereunder. If Lessee shall fail to provide the insurance protection required hereunder or fail to pay the premiums therefor, Lessor may insure the Equipment at Lessee's expense and any premium or premiums so paid by Lessor shall be repaid by Lessee with interest at the legal rate within thirty (30) days thereafter, and failure to do so shall be deemed to be a breach of this lease. Each policy shall expressly provide that such insurance as to Lessor and its assigns shall not be invalidated by any act, omission or neglect of Lessee. Lessor may apply proceeds of such insurance to replace or repair the equipment and/or to satisfy Lessee's obligations hereunder, or may require that Lessee so replace the same with equipment of like nature and in good repair. No loss, theft, damage or destruction of the Equipment shall relieve Lessee of the obligation to pay rent or any other obligation under this lease. If Lessor determines that any item of Equipment is lost, stolen, destroyed or damaged beyond repair, Lessor may, in lieu of the foregoing, require that Lessee pay Lessor in cash all sums then owed by Lessee to Lessor under this lease, together with the unpaid balance of the total rent of said item or items of Equipment for the pending term of this lease and an amount equal to ten (10%) per cent of the actual cost of said

EXHIBIT "A"

item, whereupon Lessee shall assign to Lessee without warranty expressed or implied its right, title and interest in such Equipment. The parties hereto agree that the said sums will equal the fair value of such item on the date of such loss, theft, damage or destruction.

13. Lessee shall comply with and conform to all laws and regulations relating to the ownership, possession, use or maintenance of the Equipment and save Lessor harmless against actual or asserted violations, and pay all costs and expenses of every character occasioned by or arising out of such use, and pay promptly when due all taxes and other public charges against or upon the Equipment. Lessee shall pay all charges and taxes (local, State and Federal) which may now or hereafter be imposed upon the ownership, leasing, rental, sale, purchase, possession or use of the Equipment.

14. This is an agreement of lease only, and nothing herein shall be construed as conveying to Lessee any right, title or interest in or to the Equipment leased hereunder except as a lessee only. Title to the Equipment shall at all times remain in Lessor. Lessee shall at all times protect and defend, at its own cost and expense, the title of Lessor from and against all claims, liens and legal processes of creditors of Lessee and shall keep all of the Equipment free and clear of such claims, liens and processes.

15. This lease and all rights of Lessor hereunder shall be assignable by Lessor without the consent of Lessee and without prior notice to the Lessee but Lessee shall not be under any obligation to any assignee of Lessor except after written notice of such assignment from Lessor. Without the prior written consent of Lessor, Lessee shall not assign this lease or its interest thereunder or enter into any sublease with respect to the Equipment covered thereby. Any assignees of Lessor shall be entitled to all rights and remedies herein conferred on Lessor, but Lessor will not thereby become such assignee's agent. Lessee will settle all claims against Lessor directly with Lessor. Lessor hereby agreeing to remain responsible therefor, and Lessee will not set up any claim or defense against any assignee of Lessor. Without limiting the generality of the foregoing, the Lessee agrees that the Lessor may assign all right, title and interest of Lessor in and to all monies due and to become due to Lessor hereunder to a financing institution (hereinafter called Assignee), consents to any such assignment and, in the event of such assignment, Lessee agrees with the Lessor as follows:

(a) That its obligation to pay directly to the Assignee the amounts (whether designated as rentals or otherwise) which become due from the Lessee hereunder shall be absolutely unconditional and those amounts (or, on failure to pay those amounts, monies equal to those amounts) shall be payable to the Assignee by the Lessee whether or not this lease is terminated by operation of law or otherwise, and the Lessee promises so to pay the same notwithstanding any defense, set-off or counterclaim whatsoever whether by reason of breach of the lease or otherwise which it may or might now or hereafter have as against the Lessor (the Lessee reserving its right to have recourse directly against the Lessor on account of any such defense, set-off or counterclaim); and

(b) That, subject to and without impairment of the Lessee's leasehold rights in and to the leased Equipment, Lessee holds said Equipment and the possession thereof for the Assignee to the extent of the Assignee's rights therein.

16. Lessor covenants to and with Lessee that except as herein provided, Lessor is the owner of the Equipment free from all encumbrances and that conditioned upon Lessee's performing the conditions hereof, Lessee shall peaceably and quietly hold, possess and use the Equipment during said term without let or hindrance.

17. There shall be deemed to be a breach of this lease (a) if Lessee shall default in the payment of any rent hereunder when due, (b) if Lessee shall default in the performance of any of the other covenants herein and such default shall continue uncured for five (5) days after written notice thereof to Lessee by Lessor or (c) if Lessee becomes insolvent, or if a petition in bankruptcy is filed by or against Lessee pursuant to any statute either of the United States or of any State (including a petition for reorganization, arrangement or an extension or for the appointment of a receiver or a trustee of all or a portion of Lessee's property), or if Lessee makes an assignment for the benefit of creditors, or if Lessee attempts to remove, sell, transfer, encumber, sublet or part with possession of the Equipment, or any part thereof. In the event of a breach of this lease as herein defined, Lessor may:

(a) Proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants and terms of this lease or to recover damages for the breach of such covenants and terms hereof; or

(b) By notice in writing to the Lessee terminate this lease, as to all or any of the items of Equipment leased hereunder, whereupon all right, title and interest of Lessee to or in the use of said items of Equipment shall absolutely cease and determine as though this lease had never been made; and thereupon Lessor may, directly or by its agents, enter upon the premises of Lessee or other premises where any of the said items of Equipment may be or be supposed to be and take possession thereof and thenceforth hold, possess and enjoy the same free from any right of Lessee or its successors or assigns, including any receiver, trustee in bankruptcy or creditor of Lessee, to hold or use said items of Equipment for any purposes whatever; but Lessor shall nevertheless have a right to recover from Lessee any and all amounts including rents which, under the terms of this lease may be then due and be unpaid hereunder for use of said items of Equipment together with any damages in addition thereto which Lessor shall have sustained by reason of the breach of any covenant or covenants of this lease, together with attorney's fees, as hereinafter provided, and such expenses as shall be expended or incurred in the seizure of items of Equipment or in the enforcement of any right or privilege hereunder or in any consultation or action in such connection. Lessor may sell the Equipment with notice, or without notice where permitted by law, at private or public sale, at which Lessor may purchase without having the Equipment at the sale, and the proceeds thereof, less expenses of retaking, repairing, reselling and reasonable attorney's fees will be credited upon unpaid rentals; any surplus shall be paid to such persons, if any, who are entitled by law to receive such surplus from Lessor prior to Lessee, and any unpaid residue thereof to Lessee and any deficiency shall be paid by Lessee with interest. Lessor may, if it so desires, instead of selling the Equipment, as above provided, retain the equipment in satisfaction of Lessee's obligations under this lease in accordance with the provisions of law relating thereto. In the event that Lessor shall upon default of lease refer said default to attorneys for commencement of legal action, there shall accrue and become owing to Lessor in addition to all other sums owing hereunder, an amount equal to twenty (20%) per cent of such sums as legal fees and expenses. No remedy of Lessor hereunder shall be exclusive of any other remedy herein or by law provided, but Lessor's remedies shall be cumulative. Failure on the part of Lessor to exercise any remedy shall not be deemed a waiver thereof, or of any default. Waiver of any default by Lessor shall not be deemed a waiver of any other or a subsequent default.

18. This lease shall automatically be renewed each year for a term of one year at the renewal specified in the schedule upon all the terms and conditions hereof unless Lessee gives to Lessor written notice of cancellation not less than thirty (30) days prior to the expiration of the preceding term.

19. All notices relating hereto shall be delivered in person to an officer of Lessor or Lessee or shall be mailed by registered mail to Lessor or Lessee at their respective addresses shown above or at such other address furnished in writing to the sender by the other party.

20. This lease is entered into and is to be construed in accordance with the laws of the State of New York and shall become effective only when same shall have been countersigned by an officer of the Lessor at its home office in New York.

21. Lessor has not made any representations of any kind, nature or description except as are in this lease specifically set forth and this lease contains all the terms and agreements entered into between the parties, and no representation, agreement, guaranty, warranty, waiver or change in this lease, not included herein, shall bind any assignee unless in writing signed by assignee.

22. Lessee will at request of Lessor execute any ancillary documents which Lessor may deem necessary to effect the purpose and intent of this agreement including financing statements pursuant to the Uniform Commercial Code. Lessee authorizes Lessor and/or Lessor's assignee and any subsequent assignees to file a financing statement signed only by Lessor or assignee in all places where necessary to perfect Lessor's security interest or to sign such financing statement on behalf of Lessee.

IN WITNESS WHEREOF Lessor and Lessee have executed this lease as of the date and year first above written.

LESSEE ZINKE-SMITH, INC.

BY _____

LEASING CONSULTANTS INCORPORATED

BY _____ Lessor

LEASING CONSULTANTS INCORPORATED
95-20 63rd Road, Forest Hills, N.Y. 11374
212-275-1500

SCHEDULE

TO LEASE NO. _____ DATED May 17, 1967 BETWEEN LEASING CONSULTANTS INCORPORATED, AS LESSOR AND AS LESSEE

All terms and conditions of said lease are in full force and effect with respect to this schedule.

A. Equipment

Cessna 411, N-3225-R

B. Lessee agrees that each unit leased hereunder is of a size, design and capacity selected by Lessee and that Lessee is satisfied that the same is suitable for its purposes and that Lessor has made no representation or warranty with respect to the suitability or durability of any such unit for the purposes and uses of Lessee, or any other representation or warranty, express or implied, with respect thereto, or otherwise, Lessor shall not be liable to Lessee for any loss, damage or expense of any kind or nature caused, directly or indirectly, by any unit leased hereunder, or the use or maintenance thereof, or the repairs, servicing or adjustments thereto, or by any delay or failure to provide any thereof, or by any interruption of service or loss of use thereof, or for any loss of business or damage whatsoever and howsoever caused.

C. Term: 5 years (sixty months)

D. For the said aforesaid Equipment the Lessee hereby agrees to pay the Lessor at the following rate and manner: $2,480.40 Monthly, payable in advance

E. In accordance with paragraph 7 of lease, the Lessee shall also obtain and pay for public liability insurance with limits of not less than One Million Dollars (single limit) and against damages or claims therefor for property damage in the amount of One Million Dollars or certificate of insurance indicating such coverage. Lessee will undertake to defend and pay for all legal and other expenses including attorney's fees in connection with any suit brought against the Lessor by reason of any such claims for damages for personal injuries, death or property damage.

F. The Lessor acknowledges receipt of the sum of $41,380.50 being the July 17, 1967 xxxxxxx month's rent will be due and payable after shipment and thereafter on the same day of each month for the term of this agreement all monthly payments will become due and payable.

G. The Lessee may, by notice in writing to the Lessor at its principal place of business given not less than thirty (30) days prior to the expiration of this schedule, continue to rent the said equipment at a one month rental of $2,480.40 payable in advance.

H. The Lessor is hereby given the right and privilege upon reasonable prior notice to the Lessee and during Lessee's regular business hours to inspect said Equipment on the premises of the Lessee or wherever the Equipment is located. The Equipment shall be kept by the Less at the following location(s):

I. The Equipment shall be kept at the above location(s) at all times during the continuance of this lease and shall not be removed therefrom without written permission of the Lessor.

J. This schedule shall be deemed to have been made in New York State and shall be interpreted under the laws of the State of New York.

ACCEPTED as a Schedule to and as a part of the above numbered lease this 17th day of May 19 67

LESSEE ZINKE - SMITH, INC.

BY Donald L. Smith, President

LEASING CONSULTANTS INCORPORATED

BY _____

Exhibit "B"

Exhibit "C"

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

[SAME TITLE]

No. 72-429-Civ.-JE

STIPULATION OF DISMISSAL WITH PREJUDICE AS TO DEFENDANTS, CHASE MANHATTAN BANK AND H. J. GRAY CORPORATION

WHEREAS, Plaintiff filed a Complaint in this cause on March 20, 1972 and an Amended Complaint on May 11, 1972, both being duly served on the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION; and

WHEREAS, in order to avoid protracted and costly litigation, the Plaintiff and the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION, have determined to resolve all disputes existing between them, and

WHEREAS, the said parties have mutually agreed upon the following settlement of the controversy between the Plaintiff and the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION, consequently the said parties, through respective counsel, hereby stipulate to the voluntary dismissal with prejudice of the Plaintiff's claims asserted in the Complaint and Amended Complaint as against the

Exhibit "C"

Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORPORATION:

1. In consideration of the sum of $18,000 being paid to the Defendant, CHASE MANHATTAN BANK, by the Plaintiff, the Defendant, CHASE MANHATTAN BANK, and its agent, H. J. GRAY CORPORATION, do hereby acknowledge that DEVCON INTERNATIONAL CORP. has fully complied with the terms of the April 25, 1967 lease agreement executed between the Plaintiff and LEASING CONSULTANTS, INC. concerning the lease with a purchase option on a certain Cessna 411 Aircraft, and the Defendant, CHASE MANHATTAN BANK, as the assignee of all title, right, and interest of the Defendant, LEASING CONSULTANTS, INC., to lease payments on said aircraft by the Plaintiff under the April 25, 1967 pursuant to the Chattel Mortgage and Security Agreement executed on or about July 12, 1967 by LEASING CONSULTANTS, INC. and CHASE MANHATTAN BANK, does hereby recognize and verify that the Plaintiff, DEVCON INTERNATIONAL CORP., has neither defaulted in the payments due on the lease-purchase option of said aircraft nor breached the lease agreement of April 25, 1967, but instead the Plaintiff has paid in full all payments due and owing to CHASE MANHATTAN BANK on the said aircraft and no payments remain due and owing under the April 25, 1967 agreement, and as such the Plaintiff is entitled to exercise the purchase option which it holds on the aircraft;

2. In further consideration of the sum of $18,000 being paid to the Defendant, CHASE MANHATTAN BANK, by the Plaintiff, the Defendant, CHASE MANHATTAN BANK, hereby transfers, conveys, and passes all right, title, and interest in and to said aircraft under the Chattel Mortgage and Security Agreement executed between CHASE MANHATTAN BANK and LEASING CONSULTANTS, INC. to the Plaintiff, DEVCON INTERNATIONAL CORPORATION;

3. In further consideration of the sum of $18,000 being paid to the Defendant, CHASE MANHATTAN BANK, by the

Exhibit "C"

Plaintiff, the Defendant, CHASE MANHATTAN BANK, and its agent, H. J. GRAY CORPORATION, hereby releases and discharges the Plaintiff from any claims which might be asserted against it by the Defendants, CHASE MANHATTAN BANK, and H. J. GRAY CORPORATION; and

4. This Stipulation does not affect in any manner the continuation of the Plaintiff's claim against the Defendant, GEORGE FELDMAN, Trustee for LEASING CONSULTANTS, INC.

Dated: Miami, Dade County, Florida this 23 of January, 1973.

AARON PODHURST
AARON PODHURST
Attorney for Plaintiff
2nd Floor, Concord Bldg.
66 W. Flagler Street
Miami, Florida 33130

ROBERT F. TRAVIA
ROBERT F. TRAVIA
Attorney for Defendants
CHASE MANHATTAN BANK
and H. J. GRAY CORPORATION
One New York Plaza
New York, New York 10004

January 18, 1973
New York, N. Y.

Exhibit "D"

IN THE

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

[SAME TITLE]

No. 72-429-Civ.-JE

ORDER OF DISMISSAL AS TO CERTAIN DEFENDANTS

This cause came before the Court upon the Stipulation of Dismissal with Prejudice as to the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORP., filed by respective counsel. Being duly informed that the Plaintiff and the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORP., have amicably settled their controversy, it is, accordingly,

ORDERED and ADJUDGED that the Plaintiff's actions against the Defendants, CHASE MANHATTAN BANK and H. J. GRAY CORP., only shall be dismissed with prejudice, with each party to bear its own costs.

DATED in Miami, Florida on the 5th of Feb., 1973.

JOE EATON
United States District Judge

Exhibit "E"

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

DEVCON INTERNATIONAL CORP., f/k/a ZINKE-SMITH, INC., *Plaintiff,* *vs.* GEORGE FELDMAN, as Trustee for LEASING CONSULTANTS, INC., Bankrupt. *Defendant.*	No. 72-249-Civ-JE

STIPULATION OF DISMISSAL

WHEREAS, in order to avoid protracted and costly litigation, the Plaintiff and the Defendant have determined to resolve all disputes existing between them, and

WHEREAS, the Plaintiff and Defendant have mutually agreed upon the following settlement of the controversy between the Plaintiff and Defendant; consequently, the said parties, through respective counsel, hereby stipulate to the voluntary dismissal with prejudice of the Plaintiff's claims asserted in the Complaint and Amended Complaint as against the Defendant and to the voluntary dismissal with prejudice of the Defendant's claims asserted in the answer and counterclaims as against the Plaintiff:

1. In consideration of the sum of $20,000.00 being paid to the Defendant by the Plaintiff, the Defendant has, by an appropriate bill of sale, transferred and conveyed to the Plaintiff the Defendant's right, title and interest in a certain Cessna model 411 aircraft, registration number N 225ZS, formerly N3225R, serial number 411-0225.

Exhibit "E"

2. In further consideration of the sum of $20,000.00 being paid to the Defendant by the Plaintiff, the Defendant hereby releases and discharges the Plaintiff from any claims which might be asserted against it by the Defendant, and in further consideration of the transfer and conveyance of the said aircraft by the Defendant to the Plaintiff, the Plaintiff hereby releases and discharges the Defendant from any claims which might be asserted against it by the Plaintiff.

Dated in Miami, Dade County, Florida this ____ day of ----------, 1973.

AARON PODHURST
AARON PODHURST
Attorney for Plaintiff
2nd Floor, Concord Bldg.
66 West Flagler Street
Miami, Florida 33130

DANIEL A. ZIMMERMAN
DANIEL A. ZIMMERMAN
Attorney for Defendant Trustee
Hahn, Hessen, Margolis & Ryan
350 Fifth Avenue
New York, New York 10001

Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE OF MOTION

73 Civ. 1205 (A.B.)

PLEASE TAKE NOTICE that upon the summons and complaint, the answer of defendant The Chase Manhattan Bank (National Association), the annexed affidavit of Robert F. Travia, Second Vice President of The Chase Manhattan Bank (National Association), sworn to June 12, 1973 and the exhibits annexed thereto, and upon all prior proceedings had herein, the undersigned will move the Court at Room 1506, United States Court House, Foley Square, City of New York, on June 18, 1973 at 9:30 A.M., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the action herein with prejudice upon the grounds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, with costs and disbursements.

Dated: New York, New York
June 12, 1973

MILBANK, TWEED, HADLEY & MCCLOY

By s/ ANDREW J. CONNICK
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for Defendant

Statement Pursuant to General Rule 9G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATEMENT
PURSUANT TO
GENERAL
RULE 9G (A.B.)

73 Civ. 1205

Pursuant to Rule 9(g) of the General Rules of this Court, defendant The Chase Manhattan Bank (National Association) ("Chase") submits the following statement of material facts as to which Chase contends there is no issue to be tried:

1. Leasing Consultants, Inc. (LCI), purchased a Cessna 411 aircraft from Sunny South Aircraft Service, Inc. Chase financed the purchase and took as security of LCI's obligation to Chase a security agreement and chattel mortgage covering the aircraft in the amount of $140,963.20.

2. Chase filed with the F.A.A. Aircraft Registry in Oklahoma City, Oklahoma the bill of sale, the chattel mortgage and security agreement (recorded July 19, 1967) and the release of a Florida bank's prior mortgage filed with the F.A.A.

3. On or about April 25, 1967, LCI, as lessor, and Zinke-Smith, Inc. (presently known as Devcon International Corporation, and hereinafter "Devcon"), as lessee, executed a lease agreement covering the same Cessna 411 aircraft.

Statement Pursuant to General Rule 9G

4. On or about July 11, 1967, LCI executed an assignment to Chase of its right to rentals and all other monies due under said lease agreement, but not the obligations contained therein.

5. Said assignment constituted a security agreement covering chattel paper.

6. Chase perfected its security interest in the chattel paper by taking and retaining possession of the lease.

7. Chase received various payments pursuant to said assignment subsequent to the filing on August 18, 1970 of LCI's petition under Chapter XI of the Bankruptcy Act, at which time the remaining rentals due Chase totalled $51,038.40. Such payments constituted 15 installments of $2,430.40 aggregating $36,456.00, and in addition, a settlement payment from Devcon of $18,000.00. From such settlement payment, $4,497.46 was returned to the Trustee as surplus, resulting in total net receipts since August 18, 1970 of $49,958.54.

Dated: New York, New York
June 12, 1973

MILBANK, TWEED, HADLEY & MCCLOY

By s/ ANDREW J. CONNICK
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for Defendant

Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (A.B.)

73 Civ. 1205

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT F. TRAVIA, being duly sworn, says:

1. I am a Second Vice President of The Chase Manhattan Bank (National Association) ("Chase") and associated with its Legal Division. I make this affidavit in support of Chase's cross motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

2. In July, 1967, Leasing Consultants, Incorporated ("LCI") purchased a Cessna 411 aircraft from Sunny South Corporation. A Florida bank held a mortgage on the aircraft which was satisfied by Chase, and as security for its advances to LCI, Chase took a security agreement and chattel mortgage covering the aircraft in the amount of $140,963.20. On July 17, 1967, Chase filed with the F.A.A. Aircraft Registry the bill of sale, the release of the Florida bank's prior mortgage, and the chattel mortgage and security agreement dated July 12, 1967, which was recorded

July 19, 1967. A copy of said chattel mortgage and security agreement is annexed hereto as Exhibit "A".

3. On July 11, 1967, LCI assigned to Chase all rentals, claims for rentals and other moneys due and to become due under and by virtue of a certain lease agreement dated April 25, 1967 between LCI as lessor and Zinke-Smith, Inc. (now known as Devcon International, Inc.) as lessee. Chase took possession of the lease to perfect the assignment, and at all times subsequent thereto retained possession of the lease until the Trustee of LCI requested the return of the original document in March, 1973. On July 14, 1967, Devcon acknowledged the assignment. A copy of said acknowledgment is annexed hereto as exhibit "B".

4. In August and September of 1971, Devcon failed to make monthly rental payments, but immediately paid these amounts after being advised by Chase of the delinquency. Afterwards, Devcon sent a letter to the Trustee stating that they had not only a lease but also a purchase option and wished to exercise the same. The Trustee, upon examining his file, found no such purchase option and declined Devcon's request.

5. After October, 1971, Devcon again became delinquent in its payment to Chase. In early 1972, Chase advised the Trustee's attorney of the delinquency and decided to go to Florida and take possession of the aircraft and attempt to sell it at public auction sale to satisfy the delinquent rentals. This was done with the full knowledge of the Trustee's attorneys and without any objection on their part. In March of 1972, H. J. Gray, Corp., acting as agent for and on behalf of Chase, took possession of the aircraft and immediately advertised the same for sale at public auction. A test flight was made, the aircraft was appraised and all was ready for the sale. Bids were coming in well over the appraised evaluation of $50,000. One day before the intended sale, Devcon went to the United States District

Court in Florida and obtained a restraining order prohibiting Chase from conducting the sale of said aircraft. A complaint was served upon Chase alleging wrongful seizure of the aircraft and demanding damages.

6. In April of 1972, a conference was held in New York at which appeared the undersigned, Aaron Podhurst, attorney for Devcon, and George Hahn and Daniel Zimmerman, attorneys for the Trustee in Bankruptcy. It was agreed at said meeting that Devcon would pay Chase the total sum of $18,000 as and for the remaining rentals due on the lease and an additional sum sufficient to cover Chase's expenses in the seizure of the aircraft. The $18,000 was received by Chase in February, 1973, and from these funds $4,497.46 representing the balance in the Chase reserve account for LCI was mailed on April 4, 1973, to the Trustee. Thereafter, in March, 1973, the Lease was delivered by Chase to the Trustee pursuant to his request.

s/ Robert F. Travia

CHATTEL MORTGAGE AND SECURITY AGREEMENT

Date JUL 1 [illegible], 19

Debtor (Mortgagor): Leasing Consultants, Incorporated

Address of Debtor: [illegible], [illegible] Hill, New York

Secured Party (Mortgagee): THE CHASE MANHATTAN BANK N.A. 1 Chase Manhattan Plaza, New York, New York 10015

1. COLLATERAL, OBLIGATIONS SECURED. Debtor hereby sells, mortgages and grants a security interest in, the property described below together with all accessories, attachments, parts, equipment, accessions and repairs now or hereafter attached thereto or used in connection therewith and substitutions and replacements thereof (hereinafter collectively called the "Collateral"), to Secured Party, its successors and assigns

YEAR	GENERAL DESCRIPTION	MODEL	SERIAL & MOTOR NO.	ADDRESS WHERE COLLATERAL TO BE KEPT
	Cessna Aircraft FAA Registration No. N3225A	411	411-0225	Ft. Lauderdale International Airport Fort Lauderdale, Florida

as security for the payment of the sum of $ 140,[illegible].20 payable in 58 instalments as follows $ 2,430.40 on JUL 1 [illegible], 19 and the same amount (except the last instalment which shall be the unpaid balance) on the same day of each month thereafter until paid, [illegible] XXXXXXXXXXXXXXXX [illegible] 19 XXXXXXXXXXXXXXX with interest thereon, if any, and as security for all other indebtedness and obligations, absolute or contingent, present or future, matured or unmatured, of Debtor to Secured Party, together with all amounts herein agreed to be paid (the indebtedness evidenced by the Note and all other indebtedness and obligations secured thereby are herein collectively called the "Obligations"). Debtor shall have the right to the possession and use of the Collateral in any lawful manner not inconsistent with this agreement or with the terms or conditions of any insurance policy thereon until default hereunder.

2. **SPECIAL REPRESENTATIONS AND COVENANTS.** Debtor represents, warrants and covenants that: (Check or fill in where applicable)

(a) **Use of Collateral.** The Collateral will be used primarily for

☐ personal, family or household purposes; ☐ farming operations; ☐ business purposes.

(b) **Proceeds of Note.** If checked here ☐, the proceeds of the Note will be used to acquire the Collateral and Secured Party may, at its option, disburse such proceeds directly to the seller of the Collateral and/or to the insurance agent or broker for insurance thereon.

(c) **Location of Collateral.**

(1) **Fixtures.** If the Collateral has been or is to be attached to real estate, such real estate is located at

(No. & Street) (City) (County) (State) (Section & Block No.)

and the name and address of the record owner, if other than Debtor, is

(2) **Collateral Used in More Than One State.** If the Collateral is used primarily for business and is of a type normally used in more than one state (trucks, road building equipment, etc.) the CHIEF PLACE OF BUSINESS of Debtor is

or, if left blank, is that shown at the beginning of this agreement and Debtor will notify Secured Party in writing immediately upon any change of Debtor's chief place of business.

(3) **Other Collateral.** All other types of Collateral will be kept at the address shown in paragraph 1 hereof or, if not shown, at Debtor's address shown at the beginning of this agreement and Debtor will not remove the Collateral from said location without the written consent of Secured Party except for a temporary period of not more than 30 days.

(d) **Other Places of Business.** If the Collateral is bought or will be used primarily for non-farm business use the address shown at the beginning of this agreement is Debtor's place of business in this State and Debtor has no place of business in any other county of this State except (if none write "NONE")

(City) (County) (City) (County)

(e) **Change of Address.** Debtor will immediately notify Secured Party in writing of any change in Debtor's address.

(f) **Motor Vehicles.** If any of the Collateral consists of motor vehicles Debtor will cause a certificate of title evidencing ownership of each vehicle to be endorsed so as to show Secured Party's security interest in all states where such endorsements are required or permitted.

3. **OTHER REPRESENTATIONS AND COVENANTS.** (a) Debtor represents and warrants that: (i) Debtor has, or forthwith will acquire, title to the Collateral free and clear of all liens and encumbrances; (ii) no financing statement covering any of the Collateral is on file in any public office; (iii) if Debtor is a corporation, the certificate of incorporation does not prohibit the security interest granted herein and the execution of this agreement will not violate any law or any agreement to which it is a party. (b) Debtor covenants and agrees that Debtor: (i) will keep the Collateral in first class order, repair and running condition, will replace any worn, broken or defective parts and will house the Collateral in suitable shelter; (ii) will promptly pay all taxes levied or assessed against the Collateral and will keep the Collateral free and clear of all liens, attachments and encumbrances; (iii) will allow Secured Party and its representatives free access to the Collateral at all reasonable times for the purpose of inspection; (iv) will promptly notify Secured Party in writing of any loss or damage to the Collateral; (v) will keep the Collateral insured by responsible companies against loss by theft and fire and against such other perils as is usually carried by owners of similar properties or as may be required by Secured Party, in such amounts and payable in such manner as shall be satisfactory to Secured Party; (vi) will reimburse Secured Party upon demand for all expenses incurred in connection with perfecting the security interest granted herein or the satisfaction thereof; (vii) will indemnify Secured Party against all claims arising out of or connected with the ownership or use of the Collateral; (viii) will not abandon the Collateral; (ix) will not sell, assign, lease, mortgage or otherwise dispose of any interest in the Collateral without first obtaining the written consent of Secured Party; (x) will not use or permit the Collateral to be used for any unlawful purpose or in violation of any federal, state or municipal law, statute or ordinance or for hire; and (xi) will not permit the Collateral to become a part of or to be affixed to any real property of any person without first making arrangements satisfactory to Secured Party to protect its security interests. If Debtor fails to observe or perform any covenant or agreement contained in this paragraph which failure is not remedied by Debtor within 10 days after written notice thereof, Secured Party may, in addition to any other remedy, take whatever action may be necessary to remedy such failure and should such action require the expenditure of moneys to protect and preserve Secured Party's interest in the Collateral (including but not limited to payment of insurance premiums, repairs, storage, transportation, removal of liens, etc.), then the amount of such expenditure shall become forthwith due and payable by Debtor with interest at the rate of 6% per annum; and if Secured Party takes any action authorized hereunder, Secured Party shall not be liable to Debtor for damages as a result of delays, temporary withdrawals of the Collateral from service or other causes.

This agreement is subject to the terms and conditions on the reverse side hereof all of which are made a part hereof. Debtor hereby acknowledges receipt of a true executed copy of this CHATTEL MORTGAGE and SECURITY AGREEMENT. Secured Party hereby consents to lease of the property subject to this mortgage.

LEASING CONSULTANTS, INCORPORATED (L.S.)

Witness, Secretary of Corporate Debtor

Debtor's — Mortgagor's — Name

By (L.S.)

THE CHASE MANHATTAN BANK (National Association)

By

By ([illegible]) (L.S.)
(Title)

(To be signed by Bank if Agreement to be filed)

(Corporate Seal)

EXHIBIT "A"

ONLY COPY AVAILABLE

TERMS AND CONDITIONS FORMING PART OF CHATTEL MORTGAGE SECURITY AGREEMENT ON REVERSE SIDE HEREOF.

4. **ASSIGNMENT OF INSURANCE PROCEEDS.** Debtor hereby assigns to Secured Party any and all moneys (including, but not limited to, proceeds of insurance, refund of unearned premiums) which may become due under any policy insuring the Collateral against any loss or damage, and directs the insurance company issuing such policy to make payment thereof directly to Secured Party. Secured Party may, at its option, apply any insurance moneys so received to the cost of repairs to the Collateral and/or to payment of any of the Obligations, in any order the Secured Party may determine, whether or not due, and shall remit any surplus to Debtor. Debtor irrevocably appoints Secured Party as Debtor's attorney-in-fact, with full power of substitution, to receive all such moneys, to execute proof of claim, to endorse drafts, checks and other instruments for the payment of money payable to Debtor in payment of such insurance moneys, to adjust and compromise any claim, to execute releases, to cancel any insurance policy covering the Collateral when such policy is not required to protect Debtor's or Secured Party's interest and to do all other acts and things that may be necessary or required to carry into effect the powers herein granted.

5. **EVENTS OF DEFAULT.** The occurrence of any of the following events shall constitute a default, as such term is used herein: (a) failure to pay, when due, any amount payable on any of the Obligations; (b) if any statement, representation or warranty made herein or in any related credit application, or in any supporting financial statement by or on behalf of Debtor shall be false or breached in any material respect; (c) failure to observe or perform any other covenant or agreement herein or in the Note or other instrument specified above; (d) death of any Debtor who is a natural person or of any partner of Debtor which is a partnership or of any guarantor or endorser of the Obligations; (e) should Debtor, or any of them if more than one, or any such guarantor or endorser, become insolvent (however evidenced) or commit any act of bankruptcy or make a general assignment for the benefit of creditors, or if any proceeding is instituted by or against any of them for any relief under any bankruptcy or insolvency laws, or if a receiver is appointed of, or a writ or order of attachment or garnishment is made or issued, or if any proceeding or procedure is commenced or any remedy supplementary to or in enforcement of a judgment is employed against, or with respect to any property of, any of them; (f) termination or suspension of the transaction of the usual business of Debtor, or (g) should the Collateral be substantially damaged or destroyed or should Secured Party deem the Collateral unsafe or at any risk.

6. **REMEDIES ON DEFAULT.** Debtor agrees that whenever a default shall be existing Secured Party shall have the following rights and remedies to the extent permitted by applicable law: (a) to declare the Note and all Obligations due and payable, at the option of Secured Party, without notice or demand, (b) to enter the foregoing premises or such place or places where any of the Collateral may be located and take and carry away the same, by any of its representatives, with or without legal process, to Secured Party's place of storage; (c) to sell the Collateral at public or private sale, whether or not the Collateral is present at such sale and whether or not the Collateral is in constructive possession of Secured Party or the person conducting the sale, in one or more sales, as an entirety or in parcels, for the best price that Secured Party can obtain and upon such terms as Secured Party may deem desirable, (d) to be the purchaser at any such sale; (e) to require Debtor to pay all expenses of such sale, taking, keeping and storage of the Collateral, including reasonable attorney's fees; (f) to apply the proceeds of such sale to all expenses in connection with the taking and sale of the Collateral, and any balance of such proceeds toward the payment of the Obligations in such order of application as Secured Party may from time to time elect; (g) to require Debtor to assemble the Collateral upon Secured Party's demand, at Debtor's expense and make it available to Secured Party at a place designated by Secured Party which is reasonably convenient to both parties; and (h) to exercise any one or more rights or remedies accorded by the Uniform Commercial Code. If the proceeds of any such sale are insufficient to pay the expenses, as foresaid, and the Obligations, the Debtor agrees to pay any deficiency to Secured Party upon demand and if such proceeds are more than sufficient to pay such expenses and Obligations Secured Party agrees to pay the surplus to Debtor.

7. **OTHER PERSONAL PROPERTY.** If at the time of repossession any of the Collateral contains other personal property not included in the Collateral, Secured Party may take such personal property into custody and store it at the risk and expense of Debtor. Debtor agrees to notify Secured Party within 48 hours after repossession of the Collateral of any such other personal property claimed and that failure to do so will release Secured Party or representatives from any liability for loss or damage thereto.

8. **FINANCING STATEMENT.** At request of Secured Party, Debtor will join with Secured Party in executing one or more financing statements pursuant to the Uniform Commercial Code in form satisfactory to Secured Party. Debtor hereby authorizes Secured Party to file a financing statement signed only by Secured Party in all places where necessary to perfect Secured Party's security interest in the Collateral in all jurisdictions where such authorization is permitted by the Uniform Commercial Code. Without limiting the foregoing Debtor agrees that whenever the Uniform Commercial Code requires Debtor to sign a financing statement for filing purposes, Debtor hereby appoints Secured Party or any of Secured Party's representatives as Debtor's attorney and agent, with full power of substitution, to sign or endorse Debtor's name on any such financing statement or other document and authorizes Secured Party to file such a financing statement in all places where necessary to perfect Secured Party's security interest in the Collateral; and Debtor hereby ratifies all acts of said attorney and said substitute and agrees to hold Secured Party and said attorney harmless from any acts of commission or omission or any error of judgment or mistake of fact or law pertaining thereto.

9. **MISCELLANEOUS.** This Agreement is in addition to and not in limitation of any other rights and remedies Secured Party may have by virtue of any other instrument or agreement heretofore, contemporaneously herewith or hereafter executed by Debtor or by law or otherwise. If any provision of this Agreement is contrary to applicable law, such provision shall be deemed ineffective without invalidating the remaining provisions hereof. If and to the extent that applicable law confers any rights or imposes any duties inconsistent with or in addition to any of the provisions of this Agreement, the affected provision shall be considered amended to conform thereto. Secured Party shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies hereunder. A Waiver by Secured Party of any right or remedy hereunder on any one occasion, shall not be construed as a bar to or waiver of any such right or remedy which Secured Party would have had on any future occasion nor shall Secured Party be liable for exercising or failing to exercise any such right or remedy. It is expressly understood and agreed that whenever the service of any notice to Debtor is required hereby or is otherwise required, such notice may be sent to Debtor by ordinary mail to the address shown at the beginning of this agreement, and if so mailed, such notice shall be deemed sufficient notice thereof. This Agreement shall be binding, jointly and severally, upon all parties described as Debtor.

10. **ADDITIONAL TERMS AND PROVISIONS:** (If none, insert "None").

This Agreement secures the indebtedness of the Debtor pursuant to a Purchase Agreement between Debtor and Secured Party dated June 23, 1967.

Acknowledgment and Agreement

To: THE CHASE MANHATTAN BANK
1 Chase Manhattan Plaza
New York, New York 10015

Lease Agreement dated April 25, 1967
Lessor Lending Consultants Incorporated

The undersigned Lessee under the Lease referred to above hereby acknowledges notice of intended assignment of Lessor's right, title and interest therein to The Chase Manhattan Bank and, to induce said Bank at its option to purchase, or to extend credit on the security of, the rights so assigned, the undersigned, upon receipt of notice of such assignment, hereby agrees and promises unconditionally to pay to the Bank at its principal office, 1 Chase Manhattan Plaza, New York, New York 10015, the rentals specified in said Lease, or amounts equal to said rentals, together with all other sums payable by the undersigned thereunder, at the times specified in said Lease and, if any such amount shall not be paid on the date specified in said Lease, to pay to the Bank interest on such amount at the rate of 6% per annum from the date so specified until such amount is paid. The undersigned's undertaking herein is in addition to and not in limitation of any and all rights of the Bank pursuant to the aforesaid assignment of said Lease, and shall constitute a direct, independent and unconditional obligation of the undersigned to the Bank, notwithstanding any terms of said Lease which might relieve the undersigned from the payment of rentals thereunder, or the termination of said Lease for any reason, or any other event whatsoever including without limitation the bankruptcy or insolvency of the Lessor or any disaffirmance of said Lease by any trustee or receiver, and notwithstanding any defense, set-off or counterclaim whatsoever, whether by reason of breach of said Lease or otherwise, which the undersigned may or might now or hereafter have as against the Lessor (the undersigned reserving its right to have recourse directly against the Lessor on account of any such defense, set-off or counterclaim).

The undersigned further agrees to hold the property leased under said Lease, and the possession thereof, for the Bank to the extent of the Bank's rights under the aforesaid or any other assignment, subject to and without impairment of the undersigned's rights as Lessee of said property. The undersigned further agrees that the Bank as assignee of said Lease shall have all the rights, powers, privileges and remedies of the Lessor under said Lease, and agrees that the Bank shall not, by reason of said assignment or otherwise, be obligated to perform any of the obligations of the Lessor under said Lease and that the undersigned shall not be entitled to terminate or amend said Lease without the written consent of the Bank. The undersigned further agrees to furnish said Bank, from time to time, upon request, such information regarding the business affairs and financial condition of the undersigned as said Bank may reasonably request. Failure to furnish such financial information to said Bank shall constitute an event of default under said Lease.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be executed and sealed with its corporate seal by its proper officers thereunto duly authorized this 14 day of July, 19 67.

(Corporate Seal)

ZINKE-SMITH, INC.

By E. W. Fletcher, Treasurer (Title)

Corporate Acknowledgment

STATE OF FLORIDA
COUNTY OF BROWARD } ss.:

On the 14th day of July, 1967, before me came E. W. Fletcher, to me known, who being by me duly sworn, did depose and say that he resides at 1081 S.W. First Terrace, Pompano Beach, Florida; that he is an officer of Zinke-Smith, Inc., the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Notary Public

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES JAN. 30, 1970
[illegible]

EXHIBIT "6"

Plaintiff's Reply Statement Pursuant to General Rule 9G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

---

73 Civil 1205 (A. Bauman)

PLAINTIFF'S REPLY STATEMENT PURSUANT TO GENERAL RULE 9g

The following is Plaintiff's statement in opposition to Defendant's cross-motion for summary judgment as to facts as to which an issue exists:

1. Plaintiff admits the factual allegations of Defendant's statement pursuant to General Rule 9g found in Paragraphs "2" (see Plaintiff's Paragraph 13); "3" (see Plaintiff's Paragraph 4); "5" (see Plaintiff's Paragraph 7); and "7" (see Plaintiff's Paragraph 10).

2. Plaintiff contests the allegations contained in Paragraph "1" thereof to the effect that Bank financed LCI's purchase of the leased aircraft because Plaintiff has insufficient knowledge or information in regard thereto and further disputes that the "security agreement and chattel mortgage" was security for any obligation of the Bankrupt to Bank. (See Plaintiff's Paragraph 12).

3. Plaintiff contests the allegations contained in Paragraph "4" thereof, except agrees that on or about July 11, 1967 the Bankrupt executed an assignment to Bank (see

Plaintiff's Paragraphs 5 and 6), and refers to the instrument itself for its terms and effect.

4. Plaintiff contests and denies the allegation contained in Paragraph "6", which allegation is in fact a conclusion of law.

5. There is a question of fact as to whether or not the Bankrupt's lease with Devcon is a contract of conditional sale.

Dated: New York, New York
June 15, 1973

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Plaintiff

By: s/ DANIEL A. ZIMMERMAN
For the Firm
350 Fifth Avenue
New York, New York 10001

Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

73 Civ. 1205 (Bauman, J.)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL A. ZIMMERMAN, being duly sworn, deposes and says:

1. I am an attorney at law associated with Hahn, Hessen, Margolis & Ryan, the attorneys for the plaintiff in the pending suit. This affidavit is submitted in support of plaintiff's motion for summary judgment and in opposition to defendant's cross-motion for summary judgment.

2. More specifically, this affidavit is addressed to defendant's seventh affirmative defense which is to the effect that plaintiff is equitably estopped from maintaining this action.

3. As appears from the papers before the court, the pending action involves a two part transaction in which the bankrupt, as lessor, leased an airplane to Devcon International Corporation ("Devcon"), as lessee, and thereafter borrowed certain monies from defendant Chase Manhattan Bank, N. A. ("Chase"), and gave Chase security interests in the lease and in the airplane as collateral security for such loan.

4. In October 1971, I received a letter from Devcon, then known as Zinke-Smith, Inc., expressing the lessee's desire to pay out the lease and exercise a purported purchase option. A copy of the letter is annexed as Exhibit "A".

5. I reviewed the bankrupt's records and did not find a purchase option. I then wrote to the lessee to that effect. A copy of my letter, dated November 10, 1971, is annexed as Exhibit "B".

6. Early in 1972 I was contacted by Robert F. Travia, counsel to Chase. Mr. Travia advised me that Devcon had stopped making its lease payments and that he wished to repossess the airplane.

7. It is and was my understanding of the transaction that the lease payments received by Chase from Devcon were used to pay the Bankrupt's installment loan with Chase. Thus when Devcon halted the lease payments the Bankrupt's loan with Chase went into default. Chase then had recourse to its security, i. e., the lease and/or the aircraft. Chase took recourse to the aircraft to satisfy the loan balance due from the Bankrupt.

8. Following Mr. Travia's call I reviewed the "chattel mortgage and security agreement" executed by the Bankrupt in favor of Chase covering the aircraft and checked with the Federal Aviation Administration to ascertain whether the chattel mortgage was recorded. The title report indicated that the chattel mortgage was recorded.

9. I then indicated to Mr. Travia that Chase appeared to have a perfected security interest in the airplane. At no time were any statements made of any kind with regard to Chase's security interest in the lease/chattel paper. Chase, of course, could at any time have applied to the bankruptcy court for an adjudication regarding the validity of its lien.

10. Despite the apparent validity of the chattel mortgage, I advised Chase not to sell the airplane on the basis that Chase's interest in the aircraft was nominal compared to the trustee's interest. This was because Chase was holding a reserve account in excess of $11,000.00 against a loan balance of approximately $15,000.00

11. Chase persisted in seizing the airplane and advertizing an auction sale. On the eve of the sale, the lessee commenced an action in the United States District Court for the Southern District of Florida seeking to (1) enjoin the sale; (2) requesting reformation of t_e lease contract to include a nominal purchase option; and (3) seeking specific performance of the lease as reformed. The injunction was granted. The original suit named Chase, its auctioneer and the bankrupt as parties defendant.

12. On April 13, 1972 I attended a meeting at Chase's offices at which the lessee, the bank and the trustee were represented. At this meeting Chase and Devcon reached apparent agreement upon settlement terms. Devcon would pay Chase $18,000.00 in return for a release. The trustee's representatives did not agree to or acquiese in the proposed settlement in any way and it was expressly understood that the trustee and Devcon would proceed to litigate their differences in an appropriate forum.

13. Shortly thereafter the trustee commenced a turnover proceeding in the bankruptcy court against Devcon. Devcon moved to dismiss on various grounds. Meanwhile, in Florida Devcon filed an amended complaint substituting the trustee as a party defendant in lieu of the bankrupt and adding a new cause of action against Chase.

14. In December 1972, the case was put on the trial calendar in Florida. Chase and Devcon had still not consummated a settlement.

15. I went to Florida for the pre-trial conference. In reviewing the trustee's case I noted that Chase had not

filed the bankrupt's assignment to it of the Devcon lease, and that this failure to record might render the assignment invalid as against the trustee. Upon returning to New York I advised Chase of my findings. I stated that if the trustee were unsuccessful in Florida in obtaining the airplane, he would have to bring suit against Chase for recovery of all post-petition payments under the lease. At the time of this conversation, the Chase-Devcon settlement had not been consummated.

16. The rationale of my statement was that if the trustee were successful in the Florida suit, I would obtain an airplane worth between forty and fifty thousand dollars. Chase appeared to have a recorded lien against the airplane which was superior to the trustee's position. If the trustee then sued Chase for the rentals (approximately $50,000.00) he would have to turnover the airplane to Chase.

17. I requested that Chase come to Florida to testify at the trial, but they insisted on a general release before they would do that. Chase's proposition was turned down. Chase had not yet received the settlement check.

18. The Florida suit went to trial and was compromised prior to a decision.

19. It is clear that no representations were made by the trustee or his attorneys in regard to the status of Chase's chattel paper security interest upon which Chase could possibly rely in consummating its settlement with Devcon. To the contrary, Chase was expressly advised that the Trustee intended to challenge Chase's security interest in the lease/chattel paper prior to the consummation of its settlement with Devcon.

Dated: New York, New York
June 21, 1973

s/ DANIEL A. ZIMMERMAN

Exhibit "A"

ZINKE-SMITH, INC.
Engineering Contractors
Box 489
Race Track Road
Pompano Beach, Florida 33061
cable address "zithco" 946-5561

October 8, 1971

Hahn, Hessen, Margolis & Ryan
350 Fifth Avenue
New York, New York 10001

Re: Leasing Consultants, Inc.

Gentlemen:

We are the lessee of Cessna, Md. 411, aircraft N-3225-R (New — 225ZS) under Lease #1016 dated April 25, 1967.

Under the terms of our purchase option, we desire to exercise our option and purchase this aircraft.

The Chase Manhattan Bank, 1 New York Plaza, New York, New York, advised us that there is a balance due of $17,012.80 on this lease, their number 1799-10023. We intend to send this amount to Chase in exchange for a valid and good Bill of Sale for this aircraft. Please make arrangements to supply Chase with a Bill of Sale so that this transaction may be finalized by October 17th, the next due date for lease payment.

Very truly yours,

Zinke-Smith, Inc.
E. W. Fletcher
E. W. Fletcher
Secretary-Treasurer

EWF:mo
c.c.: Mr. A. Olson
Asst. Treasurer
Chase Manhattan Bank
New York, N. Y.

Exhibit "B"

November 10, 1971

ZINKE-SMITH, INC.
Box 489
Race Track Road
Pompano Beach, Florida 33061

Attention: E. W. FLETCHER

Re: *Leasing Consultants, Inc.*
Lease No. 1016

Dear Mr. Fletcher:

This is to acknowledge receipt of your letter of October 8, 1971. I have examined the lease file in our possession and can find no documents or notes indicating the existence of a "purchase option". It is possible that this is due to the inadequacy of the bankrupt's records. Before we will transfer title we must be certain of the existence of a valid purchase option agreement. I am certain that you understand the fiduciary position that we are in.

We, of course, have no objection to the prepayment of the Chase Manhattan obligations. In the event that you can establish a valid purchase option, it will be honored.

Sincerely yours,

DANIEL A. ZIMMERMAN
Daniel A. Zimmerman

DAZ:af

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

73 Civ. 1205

APPEARANCES

Hahn, Hessen, Margolis & Ryan, New York City (Daniel A. Zimmerman, of counsel) for plaintiff

Milbank, Tweed, Hadley & McCloy, New York City, (Andrew J. Connick, Barry G. Radick, of counsel) for defendant

BAUMAN, D.J.

This is an action by a trustee in bankruptcy brought under § 70 of the Bankruptcy Act, 11 U.S.C. § 110, to invalidate the assignment of an aircraft lease made by the lessor bankrupt to defendant bank and to have defendant's interest in it declared subordinate to those of plaintiff trustee.

Plaintiff moves for summary judgment pursuant to Rule 56 of the Civil Rules and defendant cross moves for summary judgment and counterclaims for the proceeds from the trustee's sale of collateral.

I.

The following facts are undisputed. On August 18, 1970 Leasing Consultants, Incorporated (hereinafter "LCI"), a New York corporation, filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in

the United States District Court for the Eastern District of New York and was adjudicated a bankrupt some two months later on October 16, 1970.

During an earlier period of relative financial salubrity, LCI purchased a Cessna 411 airplane from Sunny South Aircraft Service, Inc., which it leased to Devcon International[1] for a sixty month term at a monthly rental of $2,430.40. The Devcon lease was not filed with the Federal Aviation Agency Aircraft Registry in Oklahoma City.

In July, 1967, LCI borrowed $140,963.20 from Chase Manhattan Bank (hereinafter "Chase"). To secure its loan Chase took a "chattel mortgage and security agreement", dated July 12, in the airplane; a written assignment from LCI of the Devcon lease dated July 11; and physical possession of the lease. Chase then recorded the chattel mortgage with the FAA Registry on July 19, but did not record either the Devcon lease or its assignment.

In August and September of 1971 Devcon's monthly rental payments to Chase were not promptly made and subsequently Devcon informed the trustee that it possessed a purchase option on the airplane which it then offered to exercise. The trustee, finding no such purchase option in the lease or in the bankrupt's files, rejected the offer.

By January 1, 1972, Devcon had become delinquent in its rental payments, whereupon Chase seized the airplane with the intention of selling it at public auction. One day before the sale, on March 20, 1972, Devcon commenced action against Chase in the United States District Court for the Southern District of Florida to restrain the sale and reform the lease agreement to include a purchase option at a price of $10.[2]

There ensued a number of conferences among attorneys for Chase, Devcon and the trustee, after which, in January, 1973 Chase and Devcon executed a stipulation of discon-

tinuance of the Florida action pursuant to which Chase assigned all of its interest in the mortgage to Devcon, and Devcon paid Chase $18,000, in full satisfaction of the remaining rentals due. Three months later, in April, the trustee sold the airplane to Devcon for $20,000.

What is at issue here is the $53,460[3] Devcon paid to Chase under the assigned lease after LCI filed its petition in bankruptcy on August 18, 1970, including the $18,000 paid in January, 1973. The trustee contends that Chase's failure to file LCI's assignment of the lease with the FAA registry left Chase without a perfected security interest in the lease payments making its interest subordinate to his rights and invalid as against him. Chase contends that its security interest in the lease was perfected by taking physical possession of it and by filing the chattel mortgage with the FAA and that recording the assignment was not a condition for perfection. Chase further contends that the trustee sold the airplane without adequate notice to Chase and for less than its fair market value and counterclaims for $55,000.

II.

What remains for my determination is the legal question as to whether, by taking possession of the lease and filing the chattel mortgage with the FAA, Chase perfected its security interest or whether, under the law, more was required.

Section 1403 of the Federal Aviation Act, 49 U.S.C. § 1403,[4] establishes a nation wide recording system for security interests in airplanes. Any conveyance for which recording is required by Section 1403(a)(1) as "affect [ing] the title to, or any interest in, any civil aircraft," is invalid except as against those persons with actual notice if it is not recorded. See 49 U.S.C. § 1403(c). Its purpose, as stated in *Marsden* v. *Southern Flight Service, Inc.*, 227

F. Supp. 411, 415 (M.D.N.C. 1961), is "to protect persons who have dealt on the faith of recorded title . . . and as to whom it would be a fraud to give effect to unrecorded titles to their detriment." See also *International Atlas Services, Inc.* v. *Twentieth Century Aircraft Co.*, 251 Cal. App. 2d 434, 438, 59 Cal. Rptr. 495, 497, 476 P.2d 402, 405 (Ct. Ap. 1967). Like the Federal Ship Mortgage Act,[5] the FAA recording system represents an attempt by Congress to give fair notice of security interests in highly mobile collateral to interested parties through one readily accessible, national filing system.

Because it represents federal action in this area, Section 1403 preempts, albeit not completely, those provisions of the Uniform Commercial Code which might otherwise apply as is implicitly recognized by Section 9-104 of the U.C.C.[6] and explicitly acknowledged in the Official Comment to that section.[7] Validation under the FAA recording system is in every respect equivalent to perfection of a security interest under the U.C.C.,[8] although, unlike the U.C.C., the FAA system provides only one way in which security interests in aircraft can be perfected. It does not envisage the variety of methods permitted for differing types of collateral.[9] So, the validity of Chase's security interest in the Devcon lease against the trustee must be determined solely under the FAA recording system.

This, in turn, depends upon whether the assignment is a "conveyance which affects the title to, or any interest in, any civil aircraft" for which Section 1403(a)(1) requires recordation, or, even if so, whether the trustee had the actual notice of the assignment contemplated by Section 1403(c).

Unfortunately, the regulations promulgated by the Federal Aviation Agency, pursuant to Section 1403 do not resolve the first question. Although 14 C.F.R. § 49.31(a) specifically requires the recording of "a bill of sale, con-

tract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of tax lien or of other lien'' as instruments affecting title to or an interest in an aircraft, it makes no reference to the assignment of an interest under a lease.

It would seem incontrovertible that the statutory language ''conveyance which affects . . . any interest in'' an airplane should encompass an assignment of a lease. Clearly the present possessory right and the entitlement to rentals conferred by a lease agreement are property ''interests'' as the term has been generally understood;[10] less than ''title'' perhaps, but ''interests'' nonetheless[11]. It then follows that assigning a lease ''affects'' the lessor's interest by transferring its primary incident, the right to receive rentals.

Therefore, Section 1403(a)(1) in my view requires that an asignment be recorded with the FAA in order to perfect a security interest in the lease. Chase apparently regarded the lease as falling within the designation ''chattel paper'' set forth by U.C.C. 9-105(1)(b), and thus attempted to perfect its security interest by taking possession of the lease, as permitted by U.C.C. § 9-305. But, as we have seen, the FAA recording system preempts the U.C.C. perfection requirements as to interests in aircraft and Chase's attempted U.C.C.—perfection was futile.

The conclusion seems inevitable that Section 1403 should be construed broadly to embrace all conveyances of interests in airplanes when the failure to record them might be misleading to creditors and other innocent third parties. See *Marsden* v. *Southern Flight Service, Inc.,* supra, 227 F.Supp. at 415. Here, Chase filed only the chattel mortgage and not the lease or its assignment. This meagre filing does not give notice that the airplane was leased—a conveyance for which filing is specifically required by 14 C.F.R.

§ 49.31(a)—or that the lease payments were to be made to Chase and not to LCI. A potential creditor of LCI, or even a subsequent purchaser of the airplane, consulting the FAA files, might be misled into the wholly justifiable conclusion that LCI owned a valuable possessory interest in an airplane and, *a fortiori,* was entitled to the rental payments (which may well have exceeded the payments due under the mortgage) should such possessory interest be leased out. The perfection of security interests under Section 1403 is not too burdensome to expect of anyone seeking its protection. See *Smith* v. *Eastern Airmotive Corp.,* 99 N.J. Super. 340, 240 A.2d 17 (Super.Ct. 1968).

Insofar as the trustee in bankruptcy succeeds to the rights of creditors who could, by the date of bankruptcy, have completed all necessary processes to perfect a lien in the bankrupt's property by reason of Section 70c of the Bankruptcy Act, 11 U.S.C. § 110(c), and since the notice given by Chase would have been inadequate as to them, I find that the filing of the chattel mortgage was inadequate to confer the actual notice of the assignment contemplated by 49 U.S.C. § 1403(c) upon the trustee.

Therefore, I hold that Chase's failure to file either the Devcon-LCI lease or its assignment to Chase left its security interest in the lease unperfected. As a consequence, Chase's interest is subordinate to the rights of the trustee and invalid as against him.

Chase's counterclaim for the market value of the airplane must fail since Chase assigned all of its interest in the mortgage to Devcon prior to the trustee's sale. In short, since Chase had divested itself of its reversionary interest under the chattel mortgage before the sale, it consequently suffered no resulting loss as a result of the sale.

Having successfully maintained his claim under Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), the trus-

tee acquired the status of a creditor as of "the date of bankruptcy," interpreted in *Lewis* v. *Manufacturers National Bank*, 364 U.S. 603, 607 (1961), to be the date upon which the petition in bankruptcy is filed. Accordingly, the trustee is entitled to the payments received by Chase from Devcon after that date, August 18, 1970.

No genuine issue exists as to any material fact and plaintiff is entitled to judgment as a matter of law. Accordingly, summary judgment is granted for the plaintiff-trustee. The parties are directed to settle order on notice in the account of $53,460 plus interest.

It is so ordered.

Dated: January 8, 1974

s/ ARNOLD BAUMAN
U. S. D. J.

FOOTNOTES

[1] Formerly known as Zinke-Smith, Inc.

[2] An amended complaint was filed on May 17 including the trustee as a defendant and adding a cause of action against Chase based upon a theory of wrongful seizure.

[3] Any remaining underlying indebtedness of LCI to Chase is not at issue.

[4] The relevant parts of § 1403 are as follows:

"§ 1403—Recordation of aircraft ownership—Establishment of recording system

(a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

* * *

Recording of releases, cancellations, discharges or satisfactions.

(b) The Administrator shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

Validity of conveyances or other instruments; filing

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the administrator . . . .

Effect of recording

(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation . . . .

Form of conveyances or other instruments

(e) No conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or

FOOTNOTES—(Continued)

of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

Index of conveyances and other instruments

(f) The Administrator shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to—

(1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in subsection (a)(3) of this section, the location or locations specified therein, and

(2) the names of the parties to the conveyance or other instrument.

Regulations

(g) The Administrator is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with civil aircraft of the United States, aircraft engines, propellers, appliances, or parts."

[5] 46 U.S.C. §§ 911-84 (1970).

[6] "§ 9—104. Transactions Excluded From Article

This Article does not apply

(a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property . . . .

Uniform Commercial Code § 9—104."

[7] "Official Comment

Purposes:

To exclude certain security transactions from this Article.

1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests

FOOTNOTES—(Continued)

are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. Legislation covering aircraft financing has been proposed to the Congress, and, if enacted, would displace this Article in that field. The present provisions of the Civil Aeronautics Act (49 U.S.C.A. § 523) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article (Section 9—302(3)); but to the extent that the Civil Aeronautics Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article, pending passage of federal legislation.

U.C.C. § 9—104, Comment 1."

[8] See generally Note, Security Interests in Aircraft, 10 B.C. Ind. & Com. L.Rev. 972 (1969).

[9] See Levie, Security Interests in Chattel Paper, 78 Yale L.J. 935. For instance, U.C.C. § 9-305 provides for the perfection of a security interest in "chattel paper" by the secured party taking possession of the collateral, the chattel paper itself. On the other hand, in order to perfect a security interest in "goods," it is necessary to file a financing statement in the state where the goods are located. See U.C.C. §§ 9-102(1), 9-302, 9-401(1)(c). The FAA recording system draws no distinctions, for purposes of perfection, among various types of collateral.

[10] In this connection see Coke upon Littleton *345b:

"Interest . . . is vulgarly taken for a terme or chattel reall, and more particularly for a future terme . . . . [I]n legall understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall passe . . . ."

[11] Tenants or lessees are said to be possessed of a leasehold estate, and landlords or lessors to possess a reversion. I American Law of Property § 3.2 (A.J. Casner ed. 1952). Such estates are also "interests" which may be assignable, depending upon the terms of the lease. Id. § 3.56 at 294-95. When a lease is assigned by the lessor, the right to receive rentals is transferred to the assignee, "affecting" the lessor's interest by removing one of its primary incidents, the right to receive rentals.

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

73 Civ. 1205AL
#74,116

ORDER

Upon consideration of plaintiff's motion for summary judgment and defendant's cross-motion for summary judgement, it is

ORDERED, that plaintiff's motion is granted and defendant's motion is denied and that judgment be entered against defendant in the sum of $53,460.00 plus interest, with interest computed at the proper legal rates on the component parts of said sum as set forth below from the respective dates set forth below:

a.	$2,430.40	08/24/70	i.	$ 2,430.40	05/11/71
b.	$2,430.40	09/24/70	j.	$ 2,430.40	05/24/71
c.	$2,430.40	10/26/70	k.	$ 2,430.40	07/01/71
d.	$2,430.40	11/23/70	l.	$ 2,430.40	07/27/71
e.	$2,430.40	12/29/70	m.	$ 2,430.40	10/14/71
f.	$2,430.40	02/04/71	n.	$ 2,430.40	10/14/71
g.	$2,430.40	02/22/71	o.	$ 2,430.40	12/22/71
h.	$2,430.40	03/24/71	p.	$17,004.00	01/15/73

New York, New York
January 23, 1974

s/ ARNOLD BAUMAN

U. S. District Judge

JUDGMENT ENTERED Jan 28 1974

RAYMOND F. BURGHARDT
Clerk

one(1) copy received
5/31/74
Holm, Herron, Mayoh
+ Boyce
D A Brown